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T R E A T I S E

ON THE

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OF

M O R T G A G E S.

THE FOURTH EDITION,
REVISED, CORRECTED, AND GREATLY ENLARGED;
TOGETHER WITH
AN APPENDIX OF PRECEDENTS.

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IN TWO VOLUMES.

VOL. II.

Haud ignara mali, miseris succurrere disco. —ÆNEI. LIB. I.

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To object now to the transfer would be to
subvert the fundamental principle of property,
which was originally set forth in the words,

"I sell off land to you only so long as you
properly pay for it."—*Blackstone's Inst. 11. 116.*

CAP. XIV.

OF NOTICE EXPRESS AND IMPLIED.

NOTICE is of two kinds. First, actual notice, as where a man is party to a deed, or has notice of it regularly served upon him, or the like.

But the charge of *actual* notice must be founded upon something certain and circumstantial: Thus (*a*), where one came to a vendee, and said to him, "Take heed how you buy 'such land, for *A* hath nothing in that, except 'upon trust to the use of *B*,'" and another came to the vendee and said to him, "It was

(*a*) *Wildgoose v. Wayland, Gouldsbrough, 147,*
case 67.

* D o

" not

"not as he was informed, for *A* was seised of "this land absolutely," by which the vendee bought the land; the question was, whether the first caveat given to the vendee was a sufficient notice of the trust or not? The Lord Keeper said, that it was not; for flying reports were many times fables, and not truths; and if this should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered.

Secondly, Presumptive notice, which is a *conclusion* of law (where, by the exercise of common diligence, without any extraordinary precaution, a man cannot but acquire a knowledge of a fact) that he has notice thereof, although no *actual* proof of notice be exhibited against him.

Thus (*b*), where *A*, a copyholder in fee, mortgaged to *J. S.* who was admitted by *B*, the steward of the manor; and afterwards *A* made a second mortgage to *C*, who was also admitted by *B*; and then a *mortgage to B*, who bought in *J. S.*'s security; it was decreed that *B* should not postpone *C*; because it is presumed, from

(*b*) *Brotherse v. Bence, Fitz. Gib. Rep. 118. 2 E. Ca. Abr. 615. 11.*

the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor, when *C* was admitted, must know or have notice of the *mesne* mortgage to *C*.

Where a purchaser *cannot make out a title* but by a *deed*, which leads him to a fact material to it (*c*), he will not be deemed a purchaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

Thus (*d*), where *B* devised to *J* in tail male, and if he died without issue male, to *Y* in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers Company; and *Y* afterwards levied a fine to the use of him and his heirs (on which was five years non claim) and then granted a rent charge of 100*l. per annum* to *S*, and mortgaged the premises to *L*; the Court held the fine and non-claim was no bar to the legatees; for *Y* having no title, but under the will, it was implied notice to all purchasers under him.

(*c*) 2 Ch. C₂. 246. Gilb. Rep. Eq. 8. 1 Ch. C₂. 291.
Dunch v. Kent, 1 Vern. 319.

(*d*) Drapers Company v. Yardly, *et al.* 2 Vern. 662.

So (*e*), where an annuity was granted to *A* by the crown, by patent issuable out of the excise upon special trust, that all such of the creditors of *B*, as would come in *within a twelve-month*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and *A*, after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from *B*, but were in truth for *A*'s own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration. It was held, that although all the creditors of *A* did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of *A*, came in under the Letters Patent, in which the trust was mentioned, and ought to have taken notice of it at their peril.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it.

(*e*) Dunch *v.* Kent, 1 Vern. 260, 319.

As

As if *A* makes a conveyance to *B*, with power of revocation by will, and afterwards limits other uses; if *B* disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser, but by the conveyance which contains the power of revocation (*f*).

But in the case of *Bovey v. Smith* (*g*), a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for many years, after a fine, and where there was *room to presume*, that other trusts were appointed. In that case, *B*, the mother of *A*, being in *Holland*, and having a separate estate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby devised houses to *W*, her husband's son by a former wife, and to other trustees, in trust *for her four daughters and their children, and such of their children as should be alive at the last*, and afterwards declared the trust of all her estate, thereby undisposed of, to be for her and her heirs.

(*f*) *Moore v. Bennet*, 2 Ch. Ca. 246.

(*g*) *Bovey v. Smith, et al.* 1 Vern. 84. 144. Sc. 2 Ch. Ca. 124.

The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance, in 1652, for a good and valuable consideration, and distributed the money, arising from the sale, equally amongst them (*h*).

A was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards *W*, the trustee, for a full consideration, purchased them back to himself and his heirs (*i*). Then *A* having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against *S*, who now stood in the place of *W*, the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.

One point argued was (*k*), that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which the trust was created, and every man that had notice of the will, must, at his peril, take notice of the operation and con-

(*b*) *Bovey v. Smith*, 1 Vern. 84. 144. Sc. 2 Ch. Ca. 124.

(*i*) *Ibid.*

(*k*) *Ibid.*

struction

struction of the law upon it. But the Lord Keeper said, this was an application, after one and thirty years possession, to affect an estate with a trust, notwithstanding a release and fine, and *that*, upon a supposal that *B* had made no other appointment (as she had power to do by the deed) *and* which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between children and issue was nice, and the question was, who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed,

So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor (*l*); for he will not, in favour of cre-

ditors or residuary legatees, be presumed to have notice of what is contained in the will of the devisor; because, whoever takes any thing from an executor, must always do it with notice of a will; and therefore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets, when he is not entitled to have the vouchers for that purpose.

Thus where *M* (*m*), having a mortgage of 3500*l.* made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executors in trust, in the first place by charging, leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son *IM*, and another person, executors, and died, leaving his widow and five children. After payment of

(*m*) Mead *v.* L. Orrery, 3 Atk. 236. July 19, 1745.
Et vid. Ewer *v.* Corbett, 2 Will. 148. Burting *v.* Stonard,
Ibid. 150.

all *M*'s debts, a large surplus remained to be divided. *IM* having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of *E*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.* and that the same was the proper money of *IM*, and assigning the mortgage and all due thereon to *B*, his heirs and assigns, with a proviso to be void, if *IM* faithfully accounted with *B* for what he should receive from the estate of *E*. *IM* afterwards died intestate, without accounting with *B*, and greatly indebted to the estate of *E*. A bill was then filed by the plaintiffs, two of the children of *M*, against the defendants, the representatives of *E*, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, whether the plaintiffs, as residuary legatees of *M*, were entitled to be relieved against the assignment of the mortgage, and to have an account; or, whether the representatives of *E* were entitled to retain the assignment? And this turned upon the point, whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of younger children? And the Court held, the

P p bare

bare point of notice of the will, in this case, was not sufficient.

So (*n*), where an executor assigned over a mortgage term of his testator to *A*, as a satisfaction of a debt due to *A* from himself; it was objected, in favour of the daughters of the testator, who were creditors under a marriage settlement, that the assignees took this assignment with notice that it was the testamentary assets of the testator. But the Court held the alienation to be good.

But if such purchaser, from an executor, hath *express notice* of a debt due from the testator still unsatisfied, and there be a contrivance between him and the executor to defeat a just debt, such a transaction will be void against creditors, and the assignee will be held liable.

Thus where *H* (*o*), being indebted to *C* on bond, died possessed of a great personal estate,

(*n*) *Nugent v. Gifford*, 1 Atk. 463. 1738. *Sc. 2 Vez. 269. Ewer v. Corbett*, 2 P. Will. 149. *Burting v. Stonard*, 2 P. Will. 150.

(*o*) *Crane v. Drake*, 2 Vern. 616. Note, Lord Hardwicke admitted the principle of this case, but doubted whether the facts warranted the application of it. *Vid. 2 Vez. 469.*

and

and made *W* executor and devisee, who wasted the estate; *D* having notice of *C*'s debt, bought a leasehold estate of *W*, by discounting 200*l.* due from *H*, 550*l.* due from *W*, and by payment of 150*l.* in money: on a bill filed by *C* to have satisfaction for his debt out of the leasehold estate, being part of *H*'s assets, the question was, whether this was a good sale to bind a creditor? And it was held it was not, for *D* was a party consenting to, and contriving, a *devastavit*.

So (*p*), where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, whether such creditor should retain it by way of security for his own debt, as well for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that a purchaser or mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far, as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favour one creditor, which would be the consequence if

(*p*) *Ithell v. Beane.* 1 Vez. 215.

P p 2

this

this was allowed. Such creditor, as to his old debt, could not be put into a better condition by taking the mortgage, but must come in, *pari passu*, with the rest of the creditors; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the Court would not suffer the trustee to do, considering the giving preference to one creditor, as a fraud, which the Court would not allow.

If a deed, by which a prior charge is made upon an estate, be delivered, among other papers relating to the title thereof, to an intended purchaser, and it be proved that a settlement among those writings is necessary to the vendor's title, the vendee will be deemed to have notice of it, and be accountable to the claimants under the settlement for the money he receives on a re-sale (q).

Thus, where the plaintiff's father and mother sold an estate to C and his heirs, which, pursuant to an agreement made on their marriage (r),

(q) *Vid. 1 Vez. 435.* Letters and writings were in the possession of a party, but in a box supposed to contain nothing but old writings.—Such party held not to have notice of the contents on application for a bill of review, founded on these letters.

(r) *Ferrers v. Cherry et al'. 2 Vern. 384.*

had

had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail male; and the conveyance was made by deed and fine. *C*, upon his purchase, took in a mortgage-term, which was prior to the settlement, entered and afterwards sold the estate to *H* and *I*. It appearing, by the proofs in the cause, that *C*, the first purchaser, *had notice of the settlement*, and that the same, amongst other writings, were delivered to him, the Court decreed, that *C* should account for the consideration-money, for which he sold the estate, with interest from the decease of the plaintiff's father and mother thereout, discounting what was due on the mortgage made prior to the settlement.

And if it doth not appear, upon the face of such settlement, whether it be voluntary, or on articles before marriage (*s*), and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case; for the purchaser, having notice of the deed, must, at his peril, purchase, and be bound by the effect of it.

(*s*) *Ferrers v. Cherry et al.* 2 Vern. 384.

But, in the last case, the bill was dismissed as to *H* and *I*, who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove any notice against them, there being no foundation to presume knowledge of the settlement, *C* being able to make a good title without it.

The adherence to this rule of equity is so strict, that, although there be no positive notice contained in a *purchase* deed, yet if there be words therein, from which the existence of a prior incumbrance must necessarily be implied, it will be sufficient to charge a purchaser.

Thus where a creditor by judgment, in 1698, for 600*l.* came to an account with the convisor in the year 1707, and settled the remainder due upon the judgment at 420*l.* and took a mortgage in fee for that sum, as a collateral security to the judgment (*t*); and one *S*, an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90l. of the consideration of the assignment, was then the full worth of the estate.* *S* was likewise in possession of another mortgage made in 1688, upon

(*t*) *Morrett v. Paske*, 2 Atk. 54. Vid. 1 Atk. 490, 491.

the same estate, as was subject to the judgment in 1698, and the mortgage in 1707. It was resolved *S* should not be allowed to tack the two mortgages together, so as to defeat intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698, and by consolidating them together, should entitle *S* to receive the sum due upon that judgment, prior to creditors after the year 1698; but, as to money reported due since the mortgage in 1707, it should be paid only in priority to creditors subsequent to 1707. One ground of which decision was, that the words in the recital of the assignment of the mortgage in 1716, *viz.* “that 90*l.* the consideration money, was the full worth of the estate *at that time,*” naturally implied, that there were intermediate incumbrances, and therefore, to give *S* the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the assignment of this *puisne* incumbrance, he must know the estate was worth no more from the very words of the recital,

And where *I C*, being seised of several freehold estates, had settled the same to certain uses, and being possessed of a prebendary lease for twenty-one years, which was usually renewed every

seven years, and which he held at the time of making his will, after charging the same, together with other freehold estates, with an annuity, devised it to the same uses, intents, and purposes, as were declared in the settlement of the freehold estates first mentioned (*u*). Then the testator died. The leasehold estate was several times renewed by the several persons in possession, and in one of the renewals, the then lessee was styled devisee of *I C.* Afterwards there were several other renewals. Then the estate was mortgaged by one of the claimants, under the settlement and will as his own property. And the question was, whether the mortgagee, who had no other notice of any defect in his title except that the lease, which was assigned to him, recited among the considerations, the surrender of the former lease, which recited the surrender of the other, in which the lessee for the time being was styled devisee of *I C.*, had such notice thereby, as would render the estates in his hands liable to the trusts of the settlement. And it was held that the mortgagee was affected with notice of the settlement, and that he must convey the estate according to the uses, &c. limited and declared therein.

(*u*) *2 Coppin v. Fernyhough*, Bro. Rep. Chan. 291.

But

But a suspicion from deeds, in which a prior incumbrance is recited, being in the hands of a family, is not sufficient evidence of notice to affect them, if they claim under a settlement, which might be made by an *apparent owner* without looking into the deeds; for in such case something farther must be shewn.

So, where there were father, mother, and son, and the father settled an estate on himself for life, then to his wife for her jointure, and on her death, to the sons of the marriage (*x*); under which settlement, the wife and son insisted on being purchasers for a valuable consideration, without notice. Notice of a prior charge was proved against the father, by recitals on his own conveyances, and in part by his own admission; but, as to the wife and son, there was no proof, but from these deeds being in the hands of the family, which was held not sufficient to affect them with notice; because such settlement might have been made by an *apparent owner* without the deeds having been looked into.

And whatever is sufficient to put the party charged with notice upon an enquiry, is good notice in equity (*y*): thus, where infants, en-

(*x*) *Whitfield v. Fausset*, 1 Vez. 387.

(*y*) *Smith v. Low*, 1 Atk. 489.

titled to an estate, found a person in possession then, and received rent of him for ten years after they came of age, that was held to be a sufficient notice of a lease made by their guardians, and a ground from whence to conclude that they had ratified it; for, finding a person upon their estate, was sufficient to put them upon enquiry.

So, where a defendant claims under a conveyance made by a remainder man (z), where there is an estate tail prior to the estate of him under whom he purchased, it is incumbent on him to see if that estate be spent; for, if it be not, he will be considered as having notice thereof. And it will not be a sufficient denial for the purchaser to plead, that at the time of the purchase, the vendor made affidavit that tenant in tail was dead without issue, and *therefore* that he is a purchaser without notice; for, this is a denial only of the knowledge of there being a tenant *in esse*, not of knowledge of *his* title, which a purchaser is bound to take notice of.

But if, *from recital*, a title to lands be deduced by the *first* vendor, *that* will not be *sufficient*, if such estate be not paid for, to affect

(z) Kelsal *v.* Bennet, 1 Atk. 522.

a subsequent purchaser for a valuable consideration with notice thereof (*a*) ; for that does not shew that it was not paid for, or lead to an enquiry whether it was paid for or not.

If a deed, or other paper which is deemed constructive notice of a prior incumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there (*b*) ; for if a person admits, or a deed be proved to be in his custody, whether as representative of another or otherwise, it will be incumbent upon *him* to shew when it came there, for it is impossible for the other side to shew it.

And the fact of presumptive notice, founded upon the party having had a deed, whereby a title in another, elder than his own, is created, in his possession, may be controled, by shewing that although the party had notice of the deed, yet he was not aware of its effect, but was induced, upon investigation of lawyers, to draw a different conclusion on the effect of the instrument from that which in reality it produced.

(*a*) Brown Cha. Ca. 302. per Comm.

(*b*) 2 Vez. 486.

Thus

Thus where tenant for life, remainder to his first son, mortgaged for 1500*l.* (c) and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding; being advised that the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money, yet the mortgagee having had no notice thereof, and having got the deed of settlement, the Court would not relieve against him by compelling him to produce it.

Notice to a man's scrivener, attorney, agent or counsel, is sufficient notice to the party himself (d).

And therefore, where *M* suffered a recovery of an estate in *A*, and then settled all his lands in *A*

(c) *Brampton v. Barker*, 2 Vern. 159. 1 E. Ca. Abr. 333, 3.

(d) *Merry v. Abney*, 1 Ch. Ca. 38. 1 Vez. 69. 2 Vez. 477. 3 Ch. Ca. 110. *Ashley v. Bailie*, 2 Vez. 368. *Hoth-wall v. Abney*. Nelson Rep. 59.—*Note*. Lord Hard-wicke said, it would be too much to affect a party with notice, from circumstance of attorney overlooking a deed, intermixed with a great number of old family deeds, 1 Vez. 435. *N. B.* The question was as to bill of review.

upon his family (*e*); afterwards a tenement in *A*, of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then *M* mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to *B*, who had advanced the money to pay off the former mortgage. It was sworn, that *B*'s agent was present at the execution of the assignment when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to a person having the equity of redemption, but

(*e*) *Maddox v. Maddox*, 1 Vez. 61.

was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One question was (*f*), whether the last mortgagee had not notice of the youngest son's title? And the Court held, here was such evidence of general notice, either to the party himself, or to his agent, to take care, as made it necessary for him to enquire into the title, which not having done, he must take the consequence.

So, where *E* mortgaged his manor of *B* to *M*, and his heirs, for securing 3000*l.* (*g*); afterwards *G*, the father of the plaintiff *B*, lent *E* 2800*l.* and, by deed, reciting *M*'s mortgage, he declared, that after the 3000*l.* and interest paid, the estate should stand charged, and be a security for *G*'s money. *M* was no party to this deed. Afterwards *H*, one of the defendants, lent *E* 400*l.* and obtained a deed from *E* and *M*, that after *M* was paid, the estate should, in the next place, stand charged with the 400*l.* and in like manner for *C*, and several other defendants. All the securities were trans-

(*f*) 2 Vez. 485.

(*g*) Brotherton v. Hatt et al'. 2 Vern. 574.

acted

acted at the shop of *W* and *Y*, scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several lenders. The question was, whether *B* should be paid next after *M*, or whether *H* and the others should be preferred, because they had got a declaration both from *E* and *M*, who, by that means, became a trustee for them, after his own money paid? And it was decreed, that *B* should be paid next to *M*, and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent.

And although a country attorney acts by an agent in causes in *London*, yet he will be considered as the solicitor for his clients, though he resides in the country, and what is known to him, will be constructive notice to them (*h*).

And the law will be the same, though one person be agent for both parties, nor is it material, on whose recommendation or advice the agent was employed (*i*). For, where a woman pleaded that the agent, who made her marriage settle-

(*b*) 3 Atk. 37.

(*i*) *Le Neve v. Le Neve*, 1 Vez. 64.

ment,

ment, was not employed for her but as an attorney for her intended husband, admitting that he might prepare the articles, she having a confidence in him from her husband's recommendation; so that her general denial was to be taken with this admission, which left it open to the proof of notice to her agent, although personal notice was denied; it was objected, that notice to her husband's attorney or agent would not affect her; but it was held, that she had sufficiently admitted that he was agent or attorney for her, by her consenting to his preparing articles, from a confidence in her husband; and that it was no matter what ground she went upon, or upon whose recommendation or advice, it being the same thing to the plaintiffs; for it would be very inconvenient and mischievous to take into consideration from whence an agency arose. Nor was it material, that the husband also employed him, there being several cases where, in marriage settlements, the same counsel or attorney was employed on both sides, who would be both affected with notice to him, it being the same to a person having an equity.

The same principle was laid down by Lord *Northington* in the case of *Sheldon* against *Cox*, and others.

In

In this case *A* and *B* were impowered by act of parliament, to purchase estates in a certain district to enable them to build a square (*k*), *C* (who was a barrister at law, and who appeared to have taken the management of the affair upon himself) purchased a parcel of ground held on a church lease, and borrowed 3500*l.* of *D*, and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: *C* afterwards built several houses, some of which were erected upon the ground on which *D* had his security, and then *C* granted a lease of these houses to *H*, reserving a ground rent; which was done for the purpose of establishing a rent; and *H* declared himself in writing to be only a trustee for *C*. Afterwards *H* assigned some of the houses in *D*'s security to *M*, for securing a sum of money by him lent, and then he assigned all the houses to *E* likewise, for securing a farther loan. Neither *M* nor *E* had actual personal notice of the mortgage to *D*, nor of each others mortgage; but both *M* and *E* employed *C* as their counsel and agent in these transactions, and nobody else. On a bill filed by *D* for a sale of the estates, and to be paid his mortgage

(*k*) Sheldon *v.* Cox, *et al.* Amb. Rep. 624, *et vid.* Doe on Dem. of Willis *et al.* *v.* Martin, Mich. Term, 31 Geo. 3. 39.

money in the first place, one question was, whether *M* and *E* were to be affected by the notice to *C*, their agent, of *D*'s security; *Et per Curiam*, it is a fixed and settled point, that notice to the agent is notice to the principal. *C*'s acting in different capacities makes no difference. It is the same as they had been in different persons.

If one purchases in the name of another person, without any authority from him so to do, and he not having notice of this intention; yet, if he afterwards *agrees to it*, he makes the former his agent *ab initio*.

Thus where *G*, in 1699, lent *W* 200*l.* upon a surrender of copyhold lands (*l*), but neglected to get the surrender presented at the next court-day as he ought to have done, for want of which the surrender was void, according to the custom of the manor. In 1703, *B* agreed with *W* to purchase the mortgaged premises for 400*l.* and took a surrender in the name of *M*, who afterwards consented to become the purchaser, and paid the money. It was proved, that *B*, whilst he was treating with *W*, had notice of the for-

(*l*) Jennings *v.* Moore *et al.* 2 Vern. 609. Sc. 1 Brown's Parl. Ca. 244. *et vid.* Merry *v.* Abney, 1 Ch. Ca. 38.

mer incumbrance, and therefore declined to purchase in his own name, and took the surrender in the name of *M*, and procured him to become a purchaser, that *B* might be paid a debt, which *W* owed him, out of the consideration-money.

On a bill filed by the executor of *G* (*m*), *M* pleaded himself to be a purchaser without notice of the plaintiff's demand; and that his surrender was presented, and he admitted tenant, without notice of *G*'s surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration-money. But it was adjudged at the Rolls, that notice to *B* was sufficient to affect *M*; for, though he did not employ *B* to purchase for him, or knew any thing of it until after *B* had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made *B* his agent *ab initio*; and *M* was decreed to pay the 400*l.* and interest, or to surrender to the executor of *G*.

But, examining a title in *one* transaction, in the ordinary course of business, which cannot

(*m*) Jennings *v.* Moore *et al.* 2 Vern. 609. Sc. 1 Brown's Parl. Ca. 244. *et vid.* Merry *v.* Abney, 1 Ch. Ca. 38.

be supposed to make any impression, as to any future event, will not operate as constructive notice to an agent in general, or counsel, or attorney, to affect his client on a *subsequent* transaction, and in another business at a distant period (*n*) ; for, an agent or counsel cannot be supposed to remember every particular circumstance, contained in deeds or papers that come under his perusal.

And Lord *Hardwicke*, in the case of *Warwick* and *Warwick*, expressed his approbation of the rule laid down in the case of *Fitzgerald* and *Falconbridge* (*o*), above-mentioned, *that notice should be in the same transaction*, and his Lordship said, that it should be adhered to, otherwise it would make purchasers and mortgagees titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions. And in the principal case, it was held that notice, arising from a case stated (by one who was an agent for both parties in a

(*n*) Case of Lord Falconbridge, cited 2 Vez. 369. *Ibid.* 370. Sc. Fitzgib. 211. *et* Worley *v.* Earl of Scarborough. 3 Atk. 392.

(*o*) Warwick *v.* Warwick. 3 Atk. 294.

subsequent mortgage) in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favourable to the purchaser.

So where lands were settled by *F*, on his marriage in 1734, which he mortgaged among others in 1736, to *W*, who had no notice of the settlement, and *R* was employed as agent in making both the settlement and the mortgage; one question was, whether *W* should be considered as having notice of the settlement, *R* having acted as agent on both occasions (*p*)? And the Court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far, as to affect the principal, unless where the agent had it, at the time of his transaction with him; and that, as the notice which the attorney had of the settlement, in this case, was two years before the mortgage, the mortgagee could not be affected by it.

It hath not been settled, whether, where one employs an attorney or counsel, and, for want

(*p*) *Steed v. Whitaker, Barnard* 220.

of dispatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior incumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself (*q*).

But it seems reasonable that, *in the case put*, the client should be bound; for the first agent is stated to have entered upon the business, the last agent to have finished it; and the law presumes, that whatever is known to the agent is likewise known to the principal; therefore, as the client must be considered, in law, as taking the business out of the hands of the former agent, with all the information the former agent had thereupon, the client must consequently be considered, either as having lost that knowledge on the transfer to the last agent, which would be absurd, or, as delivering the matter over to him subject thereto; any other construction would open a door to great fraud between a first agent and his client; for then the latter, on discovery that the former had notice, might remove any impediment arising from notice to his first agent, by taking the business

(*q*) Gilb. Eq. Rep. 7, 8.

out

out of his hands, and giving it to a new agent.

But the law might be more doubtful, if the first agent, by any accident, had given up the business, *without entering thereupon*; for it would be carrying this doctrine of notice very far indeed, to say, that the mere depositing the papers in an agent's hands, with a view to employ him, and taking them away before inspected, should be notice to the client of a fact, of which the agent, had he inspected them, would have found himself having notice. *Sed quære.*

And though counsel, &c, concerned for one of the parties may, if he pleases, demur to being examined as a witness (*r*), yet, if he consents, the court will not refuse reading his deposition, for the right to object is *his* privilege, not that of his client.

The time of executing a deed is not such an act, of which an attorney may refuse to give evidence (*s*); for a thing of such a nature as the time of executing a deed, could not be

(*r*) 1 Vez. 63. Comb. 467. Waldron *v.* Ward, Styles 449. *contra* 10 Mod. 41.

(*s*) *Vid.* 10 Mod. 41.

called the secret of a client; for that is a thing, of which he may come to the knowledge without his client's acquainting him therewith, and is of that nature, that an attorney concerned, or any body else, may inform the Court of it.

Neither can an attorney screen himself under this rule, if he does not disclose to the purchaser of an estate, whether absolutely or by way of mortgage, any incumbrance therein with which he is acquainted (*t*); for it is a principle of equity, that in transacting a purchase or bargain, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction. And this rule is not only applicable to all persons having an interest in the thing contracted about, but also to the agent, attorney, or solicitor of the buyer, having a trust and duty with his principal, who is also liable to make satisfaction, if participant in the transaction. Therefore if the attorney of the vendor of an estate, acquainted that there are incumbrances thereon, treats for his client in the sale thereof, without disclosing them to

(*t*) Arnot *v.* Biscoe, 1 Vez. 95.

the purchaser or contractor, knowing him a stranger thereto, and represents it so as to induce the buyer to trust his money thereupon, a remedy lies against him in a court of equity. And it is necessary that courts of equity should adhere to this principle, to preserve integrity and fair dealing between man and man, most transactions being by the intervention of an attorney or solicitor. This case therefore is distinguished from that of disclosing the general circumstances of a client, with the knowledge of which an agent is trusted, of which it would not be proper to give notice.

And if the discovery of that (*u*), of which a counsel is called upon to give evidence, be made to him before such time as he is retained, he is not entitled to this privilege, but may be sworn.

If one take a mortgage by assignment from a mortgagee (*x*), affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better right than he has himself.

(*u*) *Cuts v. Pickering*, 1 Vent. 197.

(*x*) *Vid. Whalley v. Whalley, et al.*, 1 Vern. 484.

And

And if such original mortgagee, in a bill filed by the person setting up an *eigne* title against the mortgagee and his assignee, and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him (y).

Therefore, if an estate be settled upon trust for raising a specific sum, and afterwards a mortgage be made thereof to a mortgagee, with notice of that trust, and then a subsequent mortgage be made to one who hath notice of the prior mortgage, but not of the antecedent trust of which the first mortgagee had notice, yet the last mortgagee must take subject to that demand (z); for he, having notice of the first mortgage which is prior to his, but posterior to the trust, must consequently take, subject to the first mortgage; and being subject to that, must be subject to every thing *that* was subject to. This may be proved, by considering the

(y) *Vid. Whalley v. Whalley, et al.* 1 Vern. 484.

(z) *Earl of Pomfret v. Lord Windsor,* 2 Vez. 185.

right

right and order of redemption in the Court; as for example, the *ceftui que trust* of the trust-estate, having a prior incumbrance, may compel the first mortgagee to redeem him, which if done, the former will have a right in both capacities to compel the last mortgagee, or those claiming the benefit of that mortgage, to redeem him as to both; for a court of equity will not take from the *mesne* mortgagee the legal estate, which he will have got from the trustees, unless his demand be wholly satisfied.

Notice of an act of bankruptcy will not be presumed against a *puisne* mortgagee, who lends his money after the act of bankruptcy committed, to take from him the benefit of an *eigne* incumbrance purchased in; for though, at law, the assignment to the assignees hath relation back to the time of the act of bankruptcy committed, and the construction of statutes be the same in equity as at law, yet it would be too hard to extend a penal law, in a court of equity, to the prejudice of the mortgagee. Besides, where a statute is to be carried into execution, *in equity*, the rule, *that a purchaser for a valuable consideration without notice shall not be deprived of any advantage, which will enable him to defend himself*, will be applied, as well in cases arising under an act of parliament, as in those occurring at common law.

Thus, where *T* having made mortgages (*a*) of some parts of his estate, these mortgages afterwards by *mesne* assignment became vested in *W*, and carried with them the legal estate. *T* then became a bankrupt, but, before the assignment of *T*'s effects to the assignees, *W* obtained a release of the equity of redemption from *T*, for a valuable consideration; on a suit brought by the assignees against *W*, to set aside these conveyances, it was held, that a purchaser for a valuable consideration without notice of the bankruptcy, could not be relieved against, within 21 *Jac.* 1.

And, if the mortgagee hath a better title or right to the legal estate, although it be not conveyed to him, yet he may protect himself thereby, from an act of bankruptcy.

So, where *H B*, on *May* 1st, 1710, was arrested at the suit of one *S* (*b*), for a just debt of 790*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above six months, which, although he afterwards paid the debt and many thousand pounds to others, and appeared publicly on the exchange, was adjudged an act of bankruptcy by

(*a*) *Collett v. Dorfels et Ward*, C. temp. *Talbot*, 65.

(*b*) *Wilker v. Bodington*, 2 *Vern.* 599. *Sup.* 204.

the

the statute of *Jac. 1.* Afterwards, in 1717, *H B*, on the marriage of the defendant, his son, made a settlement, by which, after reciting, that he had on his own marriage settled land, on trustees, in trust, to secure 2000*l.* to his wife if she survived; *H B*, *with the privity of the trustees, who were parties to it*, assigned all his estate, right, title, and interest to the wife's relation for the benefit of *H B* for life, and of his wife for life, &c. The plaintiff *W* was the assignee under a statute of bankruptcy, taken out against *B*, subsequent to the settlement. The question was, whether a court of equity would decree the trustees of the first settlement, to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement.

For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law; and that, although they had not the legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, *being parties to the last settlement*, were become their trustees. And it was so held by the Chancellor, who said, he took it to be the rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had
a prior

a prior legal estate, but where he had a better title, or right, to call for the legal estate than another; and therefore dismissed the bill.

A mortgagee may tack a *puisne* to an *eighe* incumbrance, notwithstanding an intermediate judgment at law; for though of record, it will not affect him, without he be proved to have had express notice thereof, before he lent his money.

Thus, where the plaintiff, having a judgment and a mortgage (*c*), exhibited his bill against the mortgagor, and conusee of a statute by the mortgagor, to have a discovery of what was due on the statute, that being precedent to the plaintiff's securities, and, upon payment, to have the same set aside; the conusee pleaded, that, after the extent, the accounts had been stated between him and the conusor, and an absolute conveyance of part of the extended lands had been made to him in consideration of his re-assigning the remainder to the conusor; and that so he was a purchaser for a valuable consideration, without notice of the plaintiff's title.

It was insisted, on behalf of the plaintiff (*d*), that his judgment being of record, the defen-

(*c*) Churchill *v.* Grove, 1 Ca. Ch. 35. Sc. Nelson, 89.
Et *vid.* Greswold *v.* Marsham, 2 Ch. Ca. 170.

(*d*) *Ibid.*

dant was bound to take notice thereof, at his peril, and that, in this case, the defendant ought not to protect his pretended subsequent purchase by his precedent statute, but that he ought, upon payment of the statute, to yield possession to the plaintiff.

This was strongly opposed by the defendant's counsel (*e*), who argued, that though judgments were of record, and a purchaser was bound to take notice of them at law, yet, in equity, where the conusee of a judgment comes to be helped to extend his judgment against a purchaser, he must prove express notice of the judgment in the purchaser, or else shall never be relieved against him; and upon this point the plea was allowed.

But, in the last case, the term, "express notice," must be understood, as used in opposition to constructive notice, arising from the act being of record; for I apprehend, what shall, or shall not, be considered as evidence of notice of a judgment, independent of the record, is open to the opinion of the Court, and rests, either in positive proof of the express fact of notice, or in implication from other facts proved,

(*e*) Churchill *v.* Grove, 1 Ca. Ch. 35. Sc. Nelson, 89.
Et vid. Grefwold *v.* Marsham, 2 Ch. Ca. 170.

irreconcileable with want of notice of the existence of the fact, notice of which is charged. And, consequently, that if there be any circumstances in the case, from whence it may reasonably be concluded, that the *puisne* incumbrancer had notice of a judgment standing out at the time of advancing his first money, the Court will not suffer him to protect himself by getting in a prior charge on the land, although no express notice be proved.

Now we are speaking on the effect of notice of judgments; it may not be thought irrelevant to investigate the grounds on, and extent to, which judgments are binding on lands, in the hands of purchasers or mortgagees, which will lead us to a knowledge of those cases in which it is material for a purchaser or mortgagee to attend *to notice of judgments*.

It seems perfectly clear, that by the common law (*f*), for a debt for which a man had a judgment, he could not have taken lands in execution, in the case of a common person, but the goods and chattels, and profits of the debtor's corn and other crops that grew upon the land; the reason of which was, that the law did not

(*f*) Sheph. Prac. Couns. 305. 2 Rolls Rep. 296. 2 Inst. 394. 2 Rep. 12. 3 Rep. 12. 2 Atk. 609. Amb. 16. permit

permit the creditor to take away the possession of the debtor's lands, for that would have hindered the following of his husbandry and tillage, which was beneficial to the commonwealth.

But the crown might, by its prerogative (g), have had execution against the lands of the debtor.

So in the case of an heir, chargeable by the bond of his ancestor, the creditor might have taken all the lands of the ancestor in execution in the hands of the heir, by *levavi facias*, and yet he could not have had any execution of them against the ancestor himself; the reason for which was, that the common law gave an action against the heir, and in such case, if he should not have execution against the land against the heir, he could have had no fruit of his action; for the goods and chattels of the debtor belong to his executors or administrators.

No doubt it is apprehended can be entertained, but that if lands could not have been taken in execution upon a judgment at common law, in the case of a common person, *an use* could not; for at common law, in a stronger case, if

(g) Hard. 488. 495, 6. 3 Chan. Rep. 20. 11 Co. Rep. 92, 93.

ceftui que use had been attaint of treason or other offence, the use was not forfeited to the King; because it was a thing of which the law did not take notice (*h*), for that the *ceftui que* use had neither *jus in re* nor *ad rem*. And if an use was not forfeited, of which there might be a *posseſſio fratris*, &c. and which would descend to the heir, a *multo fortiori*, it could not be ſubject to the execution of a ſubject; for if it had been, then ſhould a ſubject have been in a better condition as to a use, in reſpect of execution upon a judgment, than the King, in reſpect of a for-ſeitung for treason: whereas it appears that, at the common law, the King was in a better condition than a ſubject, in reſpect of execution for his debt; as he could have execution for it againſt his debtor's lands, which the ſubject could not.

It follows from the above remarks, that as well lands, as uses and truſts, ſo far as they are, at this day, liable to execution in the caſe of a common perſon, are ſo ſubject by force of ſome ſtatute.

By the ſtatute of Westminſter, 2 Cap. 18. *Cum debitum fuit recuperatum* (*i*), when debt

(*h*) Hard. 492. 3 Inst. 19. Marquis of Wincheſter's Case, 3 Rep.

(*i*) 3 Bulſt. 63. 3 Rep. 12. F. N. B. 265, 9.

is recovered or acknowledged in the King's Court, or damages awarded, an election is given to the creditor to have a *fieri facias* unto the sheriff to levy the debt of the lands and goods, or that he should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and one half of his land "*mediatatem terræ*," until the debt be levied upon a reasonable price or extent. From this right to elect, the writ of *elegit* seems to have taken its name. And it is agreed by the best authorities, that this was the first statute that subjected the land to an execution upon a judgment, or a recognizance, which is in the nature of a judgment.

The words "*Cum debitum fuerit recuperatum*," (k) "when debt is recovered," are explained by Sir *E. Coke*, in his reading on this statute, to mean "by judgment in an action of debt, or any action wherein damages are recovered."

"*Aut recognitum*," (l) or "acknowledged," is expounded by the same author, to mean "by recognizance, acknowledged in any court of record, that hath power to receive the same."

"*Medietatem terræ sue*," (m) is said in the same reading, and agreed by the best authorities

(k) 2 Inst. 395. (l) *Ibid.* (m) *Ibid.*

to be understood of the half of such *land* (*n*), as the defendant had *at the time* of the judgment given, or of the recognizance acknowledged, unless it be conveyed away by fraud and covin to deceive his creditors, contrary to the statute in that case provided.

And upon these words “*mediatatem terræ,*” (*o*) the sheriff may extend a lease for years, and the like.

After this statute, upon a judgment given for debt (*p*), or damages in the two courts of record at Westminster, generally the moiety of all the land that the defendant had *tempore redditionis judicii*, or at *any time after*, and all the goods and chattels he had *tempore executionis*, or the *day of the writ awarded*, became subject and liable to the execution.

But it seems that for a debt for which a man had a judgment or recognizance, he was not, by this statute, enabled to have execution against lands in *use* to, or *on trust* for, his debtor; for the statute of Westminster only extended to *lands at the common law* (*q*).

(*n*) Cro. Jac. 451. 42 E. 3. 11. 42 Aff. Pl. 17. 2 H. 4. 14.

(*o*) 2 Inst. 395.

(*p*) Sheph. Prac. Couns. 305.

(*q*) 1 Rolls Abr. 888. Pl. 6. Sheph. Prac. Couns. 299.

It is plain from the construction of the statute of treason, 25 E. 3. that the word "lands," did not in a statute include *a use* or *trust*; for in that statute, the words "lands and tenements" are found, and yet that statute did not extend to *uses* and *trusts*, which is remedied by the statutes of 33 Hen. 8. cap. 20. and 27 H. 8. 10 (r).

But the stat. 26. H. 8. cap. 13. did extend to *uses* (s); because that statute *expressly* enacts, that the offender shall lose all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance *in use* or possession by *any right, title, or means*, which word "use," Lord Coke says was *necessary* to be added, for by the common law, *an use*, which was but *a trust and confidence*, was not forfeited by attainder of treason.

Accordingly, we find in a case, 11 H. 7. 23. Pl. 10. in which, in trespass, it was pleaded, that one seized in fee, enfeoffed *A*, *B*, and *C*, to the use of himself and his heirs, and afterwards the plaintiff sued execution against the land on a statute merchant. *Rede*, Just. said, if this plea be good, it must be by the statute of *Richard*

(r) 3 Inst. 19 Hard. 492. Cro. Jac. 513. Pl. 23.

(s) *Vid. Nevil's Case*, 7 Rep.

the 3d. of feoffments to others use, and this is not in the case of a statute.

And in another case, 21 H. 7. 19 b. Pl. 31. on *elegit*, the sheriff returned, that the defendant had nothing in the case, except an use. *Et per curiam*, a new *elegit* shall issue against the lands in use. But *Broke*, in abridging this case, *Tit elegit*, Pl. 11. says, *Et sic vid elegit puis elegit et de terre en use.* *Quære PER QUA LEGE?* *Videtur per statutum de Richard the 3d.*

And in the case of *Pratt v. Colt*, in 21 Car. 2. The plaintiff had a judgment against *A*, and brought his bill against his heir to subject certain lands, which he had a *decree* of the court of Chancery for (*t*), upon a *trust* for his father and his heirs, to satisfy his debt; and the defendant demurred, and the demurrer was allowed. And the Lord Keeper conceived this all one with *Bennet* and *Box's* case (*u*), in which Chief Justice *Hide*, Chief Baron *Hales*, and Justice *Wyndham* were of opinion, on hearing counsel on both sides, that *trust* lands (*x*) were not, nor ought to be deemed as assets in equity.

(*t*) 1 Ca. Chan. 128.

(*u*) 1 Chan. Ca. 10.

(*x*) *Vid. Stat. Frauds, 29 Car. 2.* this remedied.

From

From the above authorities, it seems clear that *uses* and *trusts* were not subject to executions at common law (*y*), and the circumstance of the case of the King's debtor being universally, in all the cases where it occurs, considered as a case depending upon prerogative, by which the King was privileged not to lose his debt, wherever *his debtor had either the estate or the profits of the estate*, proves as strongly as a series of adjudged cases would do, that the converse proposition holds as to the subject; to which may be added, the statutes actually made to subject *uses* and *trusts* to the debts and judgment of the person of the profits.

The statute of 1 Rich. 3. c. 1. is the first statute which subjected *uses* to an execution upon a judgment.

This statute enacted, that every estate, feoffment, gift, release, &c. made or had by any person or persons, and all executions had or made, should be good and effectual to him to whom it was made, against the seller, feoffor, &c. and against all others *having or claiming any title or interest* in the same only to the use of the

(y) Hard. 488. 495, 496. 3 Chan. Rep. 20. 13 Rep. 92, 93. Dyer, 160. b.

same seller, feoffor, donor, grantor, &c. or his heirs, at the time of the bargain and sale, &c. The statute of 1 Rich. 3. of course became obsolete after the statute of uses, 27 Hen. united the possession and the use.

But the subsequent revival of uses under the name of trusts called for a further interposition of the legislature, and a clause was introduced in the statute of frauds, 29 Car. 2. cap. 3. sec. 10. which pursues the language of the stat. of the 1 Rich. 3. as to uses *in respect of trusts*. It enacts, “that it shall be lawful for every sheriff or other officer, to whom any writ or precept is or shall be directed at the suit of any person or persons, of, or for, or upon any judgment, statute, or recognizance thereafter to be made or had, to do, make, and deliver execution unto the parties in that behalf suing, of all such lands, tenements, rectories, tithes, and other hereditaments, as any other person or persons be, in any manner or wise, seised or possessed, or thereafter shall be seised or possessed in trust for him, against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said person against whom execution thereafter should be so sued, had been seised of such lands, &c. of such estate, as they be seised of in trust for him

him *at the time of the said execution sued*; which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person as shall be *so seised or possessed* in trust *for the person* against whom such execution shall be sued. And if any *ces-tui que trust* thereafter shall die leaving a trust in fee simple to descend to his heir, then, and in every such case, such trust shall be deemed and taken assets by descent, and the heir shall be liable and chargeable with the obligation of his ancestors for or by reason of such assets, *as fully and amply as he might or ought to have been*, if the estate in law had descended to him in possession, in like manner *as the trust descended*; “any law, custom, or usage to the contrary, in anywise notwithstanding.”

Now, as the liability of lands held in trust to an execution upon a judgment against the *ces-tui que trust*, depends upon the power vested in the sheriff, by the section of the statute of frauds last-mentioned, it seems it *must be confined* within *such limits* as the statute has prescribed to the execution of the power; and as the power is *cautiously confined* “to do, make, and deliver execution unto the party in that behalf
“ suing,

“ suing, of all such lands, tenements, &c. as any
“ other person or persons be in any manner or
“ wife feised or possessed of in trust for him
“ against whom execution is so sued, like as
“ the sheriff or other officer might or ought to
“ have done, if the same person against whom
“ execution thereafter should be so sued, had
“ been feised of the lands, &c. of such estate,
“ as they be feised of in trust for him at the
“ time of the said execution sued,” it is apprehended
that no execution can attach under
this act, except on lands of which another per-
son or persons be feised or possessed in trust for
the person against whom execution is sued AT
THE TIME of the said execution sued.

Thus where *A* feised of lands in fee; con-
veyed them in *October*, 1682, in consideration
of 127*l.* to *B* and his heirs, who was only a
trustee for *C* and his wife and their heirs. And,
by indenture, in *December*, 1682, between *B* of
the one part, and *C* and *E* his wife and their
son *D* on the other part, it was agreed (z) that
B should stand feised of the premises to the in-
tent that *C* and his wife should take 4*l.* a
year for their lives, and that the rest of the pro-

(z) Hunt v. Coles, et al. Comyns Rep. 226.

fits

suits should be paid to *D* and the heirs of his body. The lessor of the plaintiff in ejectment, in *Trin. Term, 1695*, recovered judgment against *D* on a bond. In *July, 1699*, *E* and *D* borrowed 600*l.* of *G* the defendant, and for a security *B*, by their direction, mortgaged the premises to the defendant for 500 years. The lessor of the plaintiff, in 1714, obtained judgment on a *scire facias* upon the first judgment, and upon this took out execution by elegit; and the sheriff, after an inquisition which found that *D* was seised in fee, extended one moiety, and delivered it to the lessor of the plaintiff: and the doubt was if he had any title by the stat. 29 *Car. 2. c. 3.* And after argument by Sir *Constantine Phipps* on one side, and Sir *Edward Northey* on the other, it was determined by Mr. Justice *Tracey* that the execution was not good; for the words *at the time of the execution sued*, referred to the *seisin* of the trustee, and therefore if the trustee had conveyed the lands before execution sued, though he was seised in trust for the defendant *at the time of the judgment*, the lands could not be taken in execution. And Sir *Edward Northey* said, that ever since the act such construction had been thought agreeable to the statute, though he did not know it had ever been judicially

dicially determined. And a case was mentioned by Mr. Justice *Tracey* from Serjeant *Cheshire's* notes, where this opinion seemed to be allowed by Lord *Trevor*, and was not contradicted by the court.

Now, since according to the *express* letter and *judicial construction* of this statute, lands held in trust are only liable to execution on judgments, where the trustee is seised or possessed of them *at the time of the execution sued*, it seems to follow as a *necessary consequence*, that where lands are *in the hands of a trustee* at the *time* of the sale and conveyance *by the cestui que trust*, notice of judgments against the *cestui que trust* is *immaterial* to the title of the purchaser; for judgments are not specific *liens* upon lands *held in trust*, such lands are merely liable to execution *in the seisin or possession* of the trustee of a person beneficially entitled *at the time* of execution *sued out*. The statute of frauds has merely invested the sheriff with a power to make and deliver execution unto the party suing of lands, &c. of which a trustee is actually seised or possessed in trust for him against whom execution is sued *at the time* of execution *sued*. If the trust determines *before execution sued out*, such lands are

are *not* liable *at law*, and consequently not in equity, *for equity follows the law*; and at common law we have seen that lands *in use*, or *in trust*, were not liable to judgments, and they are not subject to execution on a judgment *by statute law*, unless the trustee of the person against whom execution is sued, be *seised* or possessed thereof *at the time of the execution sued out*. It is perfectly clear that an elegit could not be executed upon a trust estate sold and conveyed to the purchaser, either by the common law or under the statute; if such lands therefore were liable to a judgment, *it must be through the medium of a court of equity* by bill for relief, and to subject the lands to the debt in the hands of the purchaser: but there is no ground for equity to give such relief, because the *object*, in respect of which relief is asked, *is not such* as a judgment attaches upon *as a lien at law* or in equity. If the subject were liable at law to the execution, *but protected by equity*, such court might and does daily give relief; but the subject is not protected from the execution by equity, but is in itself *not the object of an execution*, having *passed* out of the seisin and possession of the trustee *before execution sued out*, into the hands of a purchaser. In this respect

respect it resembles stock or a legacy, neither of which a court of equity will pursue under an execution by way of relief, because they are *not the objects* of an execution *at law*. Therefore when a purchaser takes an estate from a *cestui que trust* and his trustee, before execution awarded against such *cestui que trust* on a judgment, he thereby acquires that which *is not the subject of an execution* on a judgment against the person of whom he purchased *at law*, *nor consequently in equity*, and then notice of the judgment cannot be material, since that judgment ceases to attach upon the property, *if it be not in the seisin or possession of the trustee of him against whom execution is sued out*.

The cases and authorities to which we have last referred, relate to *trusts* of the freehold or inheritance; but it is apprehended that the same principle is applicable to leasehold or chattel trusts, whether we consider them as subject to execution at common law, or under the statutes of *Westminster* or of frauds; for it seems perfectly clear that execution could only be had of the goods and chattels which the debtor

had tempore executionis, or the day of the writ awarded, or rather *at the time it is lodged in the sheriff's hands* (*a*).

And it appears that courts of equity have governed themselves by this rule in cases, where they have interposed to subject property of *this* nature, under the jurisdiction and influence of such courts, to execution.

Thus, in the case of *Angell v. Draper* (*b*), the bill was, that the plaintiff had obtained judgment against *T S*, for 100*l.* and that the defendant, upon the pretence of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment, had got goods of *J S* of great value into his hands, sufficient to satisfy his debt, with a great overplus, and prayed an account and discovery of these goods. The defendant demurred because that the plaintiff had not alledged that he had sued out execution, and had actually taken out a *fieri facias*; for, until he had so done, the goods were not bound by the judgment, nor the plaintiff intitled to a discovery or account thereof. *Et per curiam*, allow the demurrer: The plain-

(*a*) 3 Atk. 739.

(*b*) 1 Vern. 399.

tiff ought *actually to have sued out execution* before he had brought this bill.

So in the case of *Shirley v. Watts* (c), in which a judgment creditor, who had not taken out execution, brought a bill against the defendant to redeem him, who was a mortgagee of the leasehold estate. The Master of the Rolls (Sir William Fortescue) said the case last stated was a stronger than this, because there seemed to be fraud. In the present case there was not the least suggestion of fraud, the defendant being a fair and *bona fide* creditor by mortgage. There was a case of *King v. Marshal*, last term, upon a bill by a judgment creditor to redeem, which came on before Lord Hardwicke, when he asked for the writ of execution; and, upon its being produced, admitted the judgment creditor, for this reason, to redeem. For want of its being taken out now, the bill must be dismissed, because, *till execution*, the plaintiff has no *lien* on the leasehold estate, and decreed accordingly.

The reader will no doubt have observed, that in the cases of *Angell v. Draper*, and *Sherley and Watts* last stated, the plaintiffs were unable

(c) *Shirley v. Watts*, 3 Atk. 200.

to

to enforce their executions at law against the goods in the one case, and the leasehold estate in the other, the same being hypothecated or pledged, and redeemable only by the interposition of a Court of Equity. It was therefore necessary to apply to a Court of Equity, on the common equity, among creditors of redeeming each other; but though the Court admitted the right to redeem, it was clearly held, *in both instances*, that the plaintiffs, in order to intitle themselves to the interposition of the Court, must first sue out execution, that is, they must first intitle themselves to an execution *at law*, and it was admitted, that when that was done, they would then be intitled to the equitable interposition of the Court, to enable them to redeem these chattels, which, beyond the lien of the mortgagees thereon, were the proper subjects of an execution at law, and only protected by the predicament in which they stood from that execution, without the interposition of a Court of Equity.

If these observations are well founded, it is apprehended that the sheriff cannot, at law, execute a judgment upon a term of years held in trust, unless it be held in trust for the person against whom execution is sued out, *at the*

time of the writ awarded; and that if it be necessary to go into a Court of Equity to assist such execution against a trust estate, the plaintiff in equity must first place himself in that situation which intitles him to execution at law, independant of the equitable predicament in which the object of his execution happens to be placed, and then his success will depend upon his shewing that he is intitled to the equity, which he prays by his bill.

Chattels real, or terms for years, are of two kinds.

First, terms in gross.

Secondly, terms attendant upon the inheritance.

Terms attendant upon the inheritance may again be divided into two kinds.

First, Terms, the purposes of whose creation are answered, and which attend the inheritance by presumption of Equity.

Secondly, Terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance.

1st. As to terms in Gross, or Terms, the purposes of whose creation are not answered, but which are in the condition of bearing fruits, it seems

seems not to admit of a doubt, but that the reversioner or remainder man, expectant upon the determination of such terms, has, during that state of fructification, no greater or other interest therein, than a mere right to redeem them, on fulfilling the purposes of their creation. Such terms, therefore, are not subject to an execution at common law, on a judgment against the reversioner or remainder man of the inheritance; because at law we have seen they are considered as separated from the inheritance, and as a distinct and different species of property, the law taking no notice of any ownership distinct from the legal estate; and that they are not liable to an execution, under the statute of frauds, seems a necessary consequence from the decision in the case of *Lyster v. Dolland* (*d*), by which it was determined, that the equity of redemption of a mortgage term, is not within that clause of the statute of frauds which relates to judgments. Such terms, therefore, are only subjected to judgments in equity, by virtue of the equity which permits subsequent incumbrancers, and creditors to stand in the place of their debtors, and by redeeming prior incumbrances upon

(d) *Supra* et i Vez. Jun. 431. 3 Bro. Rep. Ch. 478.

their property, lay it open to an execution, which such Court will aid.

2dly. As to terms, the purposes of whose creation are answered, but which have not been assigned to attend the inheritance, their liability will, it seems, depend on the kind of connection or relation there is between the ownership of such term, and of the inheritance, that forms their union in equity, or gives the former the quality or capacity of being considered as attendant upon the latter.

Now we have seen (*e*), that the connection or relation that subsists between the ownership of such term, and of the inheritance which forms their union in equity, or gives the former the quality or capacity of being considered as attendant upon the latter, where no trust is declared for that purpose, is merely by construction in equity, founded upon the conclusion, that such attendancy is convenient and desirable for the protection of real estates, and to keep them in a right channel, by which means the dominion of them is preserved intire (*f*).

(*e*) *Supra.*

(*f*) *Supra* 391.

But

But it has been observed, that the owner may prevent the constructive coalition of the terms and inheritance, if (for any particular purposes) he thinks fit to do so, and keep them as distinct as they were at the creation of the term, *by declaring his intention to be so*; for such coalition is merely by construction in equity, upon a presumed acquiescence of the owner of the inheritance to that which, *prima facie*, appears most for his benefit. But such declaration precludes all ground for construction in equity, and puts the matter intirely upon the footing of the option of the owner, which he certainly has a right to make, as incident to his property and ownership; whether his option is more or less convenient in the end, than that which equity would have presumed for him, is immaterial, for *quilibet potest renunciare juri pro se introducto.*

Now if it be admitted, that the union of the term and the inheritance in these cases, depends upon the acquiescence of the owner (as it is presumed this must be admitted, because equity, which aims to effectuate, will never make a construction contrary to the declared intent of the parties interested); and if it be likewise admitted, that a trust estate is only liable to ex-

ecution in the hands of a trustee, at the time of execution awarded, then it seems to follow as a necessary consequence, that the reversioner or remainder man, expectant on the determination of such terms, together with his trustee, may alien such terms absolutely independant of the inheritance, and that the purchaser thereof will be intitled thereto ; and that such terms in the hands of the alienee, will not be subject to an execution, on a judgment against the *ceftui que trust* : now if that would be the case, if such terms were aliened for a valuable consideration, separate and distinct from the inheritance, there appears to be no reason why a purchaser for a valuable consideration of such term, and also of the inheritance, should not be protected during the continuance of the term from a judgment, whether he purchased with or without notice ; because, as to the term, he has purchased a subject, not liable to execution on a judgment at common law, or under the statute of frauds ; and there seems to be no equity to induce a Court of Equity to subject such term in the hands of, or held in trust for, a purchaser for a valuable consideration, to a judgment against the vendor, such judgment being no lien thereon, either at common law, or under the statute of frauds : and as such term is perfectly under

the direction of the owner, it seems that if the owner directs it to flow in the channel in which the inheritance is limited by the purchaser's deed, it will become consolidated with, and part of, that inheritance so limited, not so as to merge and extinguish in that inheritance, but so as to continue the benefit of the term to the alienee of the inheritance.

When a judgment creditor takes out execution against a remainder man, or reversioner expectant upon a term for years resulting, or in mortgage, or in gross bearing fruits, and finds himself impeded by such term, there appears to be an obvious equity in his favour to intitle him to apply to a court of equity, to subject the term to his execution, he redeeming the mortgage or discharging the demands upon it; because in such case, the execution against the term is prevented merely by subsisting trusts with which it is bound, which being discharged, it becomes a trust for him against whom execution is awarded at the time of the writ awarded, and, consequently, an equity arises under the statute of frauds, to subject the term, beyond the charge thereon, to the execution. But if the term be parted with by the person against whom the execution is sued, before execution awarded, so that such term ceases to be the object of an

execution at law, where is the superior equity of a judgment creditor to better his case in equity, or to give him any remedy against a purchaser for a valuable consideration, with or without notice, that he has not at law, or under the statute, or to change the rights of parties. Why should equity go further than the law? I know of no instance in which it does so. Equity in such case ought to follow the law, and as the plaintiff in judgment could not extend the land in the possession of the assignee of the term holding beneficially, so neither ought he to extend it when he holds in trust for a purchaser of the inheritance. Such term is not shielded against an execution by the interposition of a trust between it and the legal owner, in which cases equity withdraws its protection, but it has ceased to be subject to such execution, having become the property of a purchaser for a valuable consideration, before the judgment creditor had gained a lien thereon by taking out execution.

3dly. As to terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance. It seems reasonable that such terms should not be considered as an obstacle to the execution of judgments against the inheritance, when held in trust for a person who is affected with actual notice;

notice; because a trust of a term, which is by express declaration attendant upon the inheritance, is of the same nature with the inheritance. It is a shadow, an accessory to it, for otherwise it could not be attendant upon it. Such a term, and the inheritance on which it is attendant, become consolidated. Such term, therefore, goes with the fee, and is the inheritance itself. Therefore the trustees thereof may be considered as trustees for all incumbrances subsisting on that inheritance, upon which it is attendant, and, consequently, for creditors by judgment pending its attendance, unless it be in the case of an intermediate purchaser without notice, in which case a court of equity will sever such term from the inheritance. And if this be a just view of the nature of a term, attendant by express declaration on the inheritance, it will follow of course, that whoever takes of such trustee an assignment of such term, with express notice of a judgment pending its attendance, takes in truth to that extent, an assignment of a trust estate, with notice of a trust, and, consequently, takes subject to the trust of which he has notice.

To resume our attention to the subject of notice,

A decree

A decree made in a Court of Equity is not an implied notice to a purchaser of the matter determined, after the cause is ended (g).

There is no case in which equity has determined the property of goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels (h).

If there be several mortgages of lands lying in a registered county, each of them being registered in their proper order, and afterwards the mortgagee *eigne*, having the legal estate, advances a farther sum of money to the mortgagor, the registry of the intermediate incumbrances will not be constructive notice of them to him, to take from him the benefit of protecting himself by his legal title.

Thus, where *A* lent money on lands (i), the mortgage being duly registered, and afterwards *B* lent money on mortgage on the same security, and his mortgage was also registered, and then *A* advanced a farther sum on the same lands without notice of the second mortgage; it was

(g) 2 Atk. 392.

(b) 2 Vez. 244.

(i) Bedford *v.* Backhouse, 2 E. Ca. Abr. 615. 12.

held,

held, by Lord Chancellor King, that the registering of the second mortgage was not *constructive* notice to the first mortgagee before his advancement of the latter sums; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before.

So, in a latter case, where *W* advanced 800*l.* on a mortgage in *Yorkshire* (*k*), and registered it; afterwards *K* lent a sum of money, and took a judgment for it, which was also registered; then *W* advanced a farther sum, but without any express notice of the judgment; it was argued, on a bill brought by *W* to foreclose, that *K* ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every incumbrancer should be satisfied according to the priority of his register; and that the registering *K*'s judgment was constructive notice to *W*, sufficient to deprive him of the common benefit of a Court of Equity, whereby a first mortgagee, without notice, was to hold till all subsequent incumbrances due to him were discharged.

But it was resolved, that these statutes avoided only prior charges not registered, but did not

(*k*) *Wrightson et al. v. Hudson et al.* 2 E. Ca. Abr. 609. 7.

give

give *subsequent* conveyances registered, any further force against *prior* conveyances registered, than they had before; and that to have affected *W, K* ought to have given him notice when he advanced his money; for, though *W* might have searched the register, yet he was not bound so to do.

This construction of the registering act, appears to me consonant to the general principles of law and equity; for, if the second mortgagee had used due diligence, he might have informed himself by the register, who was the prior mortgagee, and by serving an actual notice upon him, effectually secured himself against any further loan; and therefore this case falls within the common rule, that where, of two persons equally innocent, or equally blameable, one must suffer, the loss shall be left with him on whom it is fallen. The second mortgagee having no more claim to equity than the first, the former will be left in possession of the benefit the law gives him, of protecting himself by the legal estate.

But a subsequent mortgagee (*l*), having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered, in equity, as fraudulent, and

(*l*) Cowper's Rep. 712.

the

the party hath that notice which the act of parliament intended he should have.

As, where *N*, in 1718 (*m*), married his first wife, and, on the marriage, a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, and her personal estate, to be settled on trustees, in trust, for *N* for life, then for his intended wife for life, remainder to the issue of the body of *N* by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743, *N* married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the statute 7 Queen Anne, cap. 20, which requires registry. The first marriage articles and settlement were never registered; the second were. *N* also mortgaged this estate, as absolute owner thereof.

The bill was brought by the children of the first marriage, to have the benefit of the settle-

(*m*) *Le Neve v. Le Neve*, 1 Vez. 64. 3 Atk. 646.
Et vid. Cheval v. Nichols. Strange, 664. *E Sheldon, v. Cox, Amb. Rep.* 624.

ment made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered.

The ground of this application was, that the agent, who made the last settlement, had notice of the first. And, notice to the agent having been fully made out, the principal question was, whether it would affect the defendant's purchase, and oblige the Court to postpone the second articles and settlement to the first, notwithstanding the registering act.

And the Court determined it would; for the intent of the act was to secure subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance.

And

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of *Lord Forbs v. Deniston*, which arose in *Ireland* (n).

But though apparent fraud, or *clear* and *undoubted* notice are held to be a proper ground of relief in cases circumstanced like the preceding ones (o), *suspicion* of notice, though a *strong suspicion*, was held by Lord *Hardwicke* not to be sufficient to justify the Court of *Chancery* in breaking in upon this *act of parliament*. And therefore, where a mortgagee (p), of lands in *Middlesex*, swore in his answer, that, to *his belief*, he did not know of a judgment, which had not been registered until after his mortgage executed; this was contradicted by *one* witness *only*, who swore, that, on a conversation at which she was present, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, at the same time, that it was not registered, and what were acts of parliament for, unless they were effectually observed?" Lord *Hardwicke* said, that, undoubtedly, this was *material* evidence, but then it was only *one*

(n) Recited in last case, 1 Vez. 67. 2 Brown's Parl. Ca. 425.

(o) *Vid. Jolland v. Stainbridge*, 3 Vez. Jun. 478, the evidence of notice ought to amount to actual frauds.

(p) *Hine v. Dodd*, 2 Atk. 275.

witness

witness against the answer of the defendant, and the evidence amounted merely to a defendant's *confession* in contradiction to his *answer*, and was contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His Lordship, therefore, dismissed the plaintiff's bill as to this part of the case.

I have not met with any case wherein it hath been determined that a *puisne* mortgagee, where there are several incumbrances registered, shall protect himself, by purchasing in an *eigne* incumbrance, which brings with it the legal estate; but that case seems to fall within the same reason as the last.

It is evident, from the preamble of the 2d and 3d *Ann. c. 4*, that the object of the legislature, in that statute (which laid the foundation of the subsequent registering acts) was to enable mortgagors to give such satisfactory security to moneyed men, as would induce them to advance their money, on landed security, to persons in trade, which it was thought would tend to the national benefit.

The mode adopted by the legislature to effect this purpose, was, to secure them against prior claims,

claims, by establishing a register, where all incumbrances that affected the estate might be seen; and by giving securities registered, though posterior in date, a priority: but it was not necessary to alter the law, as to the priority amongst incumbrances registered; for, if a mortgagee neglects searching the registry, he ceases to be an object of legal favour; and, if he searches, and, notwithstanding there be an incumbrance prior to his, lends his money, he takes the equitable estate *only*, with notice, and, having voluntarily accepted it, of course becomes liable to the incidents and contingencies to which that kind of security is, in its nature, exposed.

The true construction of the act therefore seems to be, that it has left mortgagees, whose incumbrances are registered, in the same situation, as to each other, as they were previous to these statutes. In which case, the *puisne* mortgagee, having purchased in the first incumbrance, would have been entitled to a priority; he having the best title in law, and as much equity as the *mesne* mortgagee.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himself from discovery of his title-deeds if he denies notice (*q*). For,

¹⁰ (*q*) *Senhouse v. Earle*, 2 Vez. 450. *Perrat v. Ballard*, 2 Ch. Ca. 73. *Ibid.* 135, 136. 1 Vern. 27.

if a plaintiff brings his bill to redeem ever so strongly, he is not entitled to see the mortgagee's title-deeds, because a third person may find out a flaw in them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money; this is a first principle, and not to be argued, and depends on the denial of notice.

Thus, where the plaintiff's bill was to set aside a conveyance made to the defendant by *A*, on the ground that the defendant was no real purchaser (*r*), or, if he were, yet, before his purchase, he had notice that the estate was subject to a trust for the plaintiff, and that a lease in the defendant's custody mentioned it; the defendant swore himself a purchaser without notice of any trust, and that the lease mentioned no such trust. The plaintiff replied. The defendant proved his purchase, and the plaintiff proved no notice upon him. But, at the hearing, it was insisted, that he ought to produce the lease to shew there was no mention of the trust; besides, the answer being replied to, it was said, he was bound to prove it, which he could not do, without shewing the deed; for he took upon himself to judge what deed would amount to notice, and what would not, which he ought not

(*r*) Hall v. Atkinson, 1 Eq. Ca. Abr. 333, 4.

to do. For, implied notice being as strong as express notice, if the lease mentioned *only the date and parties of another deed, which mentioned a trust*, it was deemed an implied notice, which the defendant might not know; and, therefore, the Court ought to see it, that they might judge of it.

But it was argued, on the part of the defendant, that being a purchaser, by the rule of the Court he was not obliged to produce this lease, or shew his title; that this was an attempt to alter that rule, by a fide-wind, and that it was as easy to say in a bill, it was in some of the deeds, as in any one in particular, and then he must expose them all, which would be of dangerous consequence to purchasers.

It was replied, that if the deed were not produced (*s*), then, if one had a mortgage with a proviso of redemption, yet if the mortgagee was hardy enough to swear it an absolute purchase, and the mortgagor had no counterpart, he must lose his estate.

The Master of the Rolls thought, that as this case was, the deed ought to be produced; but the

(*s*) Hall *v.* Atkinson, 1 Eq. Ca. Abr. 333, 4.

Lord Keeper held otherwise, saying, it was a side-wind to make a purchaser expose his title (*t*), which his Lordship would not do, *unless the plaintiff had made some proof*, tending to falsify the answer, to induce him to it.

And where, upon a decree for a foreclosure *nisi* (*u*), the defendant moved, that the plaintiff might lay the deeds before counsel, in order to have the mortgage assigned to one who would advance the money, it was insisted, that such an order was never made. And so it was held; and the Lord Chancellor accordingly made an order that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title deeds.

But where the mortgagee consents to a sale, he thereby submits to do every thing which is necessary to a sale; in such case, therefore, he will be compelled to produce the title-deeds, the inspection of them being necessary before a sale can be made (*x*).

But a refusal to produce the title-deeds (*y*), in case of a decree of foreclosure *nisi*, seems to

(*t*) Hall *v.* Atkinson, 1 Eq. Ca. Abr. 333, 4.

(*u*) Anonymous, Moseley, 246. (*x*) *Ibid.* (*y*) *Ibid.*
furnish

furnish good reason to enlarge the time to redeem, if the defendant applies to the Court on that head.

If *A* purchases an estate (*z*), with notice of an incumbrance, or that it is redeemable, and then sells to *B*, who has no notice, who afterwards sells to *C*, who has notice; by this the notice to *A*, the first purchaser, will not be revived; for, if it were, an innocent purchaser, without notice, might be forced to keep his estate; he could not sell, and would be accountable for all the profits received *ab initio*. But the interest must be the same in *every* respect, or the principle does not apply.

Upon this ground (*a*), where *A*, who was entitled to the equity of redemption in certain lands, had brought his bill against the representatives of *B*, who was the *mesne* purchaser, and likewise against *C*, who was the *puisne* purchaser; *A* had not replied to the answer of the representatives of *B*, and the question was, whether they should not have been brought before the Court as proper parties? *Et per Lord Hardwicke*,

(*z*) *Harrison v. Forth*, Prec. Ch. 51: *Et vid.* also *Lowther v. Carlton*, Ca. temp. Talb. 187. Sc. 2 Atk. 139. *Et vid.* *Brandlyn v. Ord*, 1 Atk. 571. *Sweet v. Southcote*, 2 Bro. Rep. Ch. 66.

(*a*) *Lowther v. Carlton*, Ca. T. Talb. 187. 2 Atk. 139.

Chan. the representatives of *B* deny he (*B*) had any notice of *A*'s title at the time he purchased, and it is admitted on all hands that *C*, who purchased of *B*, had notice of the title; now, if I should go on with this cause, I should deprive *C* of the benefit he would have from the defence which is set up by the representatives of *B*. It is like the cases at law by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this reason, his Lordship allowed the objection, for want of parties in not bringing the representatives of *B* before the Court.

Again, where a bill was brought to discover whether the defendant (*b*), who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was assignee of the mortgage, for valuable consideration, and through many assignments from persons who had no notice. It was argued, that this plea was not good; for it should have stated, whether the defendant personally had notice. But the Master of the Rolls allowed

(*b*) Sweet v. Southcote, 2 Bro. Rep. Chan. 66.

the

the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

The *general principle* held out in the preceding cases that a mortgagee may, in a court of equity, protect himself from the discovery of title deeds, *if he denies notice*, has been considerably shaken in a modern adjudication.

The bill stated the following case: *A*, upon the marriage of his daughter *B* with *C* the plaintiff, settled certain freehold estates to the use of himself for life, remainder to the use of *B* for life, remainder to the children of the marriage as tenants in common in tail, and for default of such issue as to part to his son *D*, as to the rest to his daughter *B* and her husband in fee (c). *A* continued in possession till his death, then *B* took possession and continued it from that time and became entitled to the possession of the title-deeds, but they had been by

(c) *Strode v. Blackburne*, 3 Vez. jun. 222. Feb. 12, 1796.

A or *D* delivered to the defendant, and she had them in her custody. The defendant set up a mortgage by lease and release from *A* for 100*l.* the bill charged that neither of the plaintiffs were privy to the mortgage, or that they did not know of it, or that the deeds had not been delivered to the defendant till a considerable time after the death of *A*, and prayed that the defendant might be compelled to deliver up all the title-deeds and evidences in her hands or power relating to the premises. The defendant, as to so much of the bill as sought a discovery of the title-deeds, pleaded the mortgage, and the plea contained averments that the defendant had no notice of the settlement, that the money was still due, and the other usual averments, and was supported by an answer denying notice. On the behalf of the defendant it was contended, that against a purchaser for a valuable consideration without notice, the court had no jurisdiction. But the Lord Chancellor over-ruled the plea as to the discovery, and ordered it to stand for an answer with liberty to except.

As the judgment in this case, *if it be law*, annihilates in a great degree that which had been previously considered by judges of the most

most distinguished eminence *as an infallible rule in a court of equity*, I cannot suppose that had this case been again agitated on an exception to the answer, the noble Lord who made the order would have dismissed all attention to the antecedent decisions on the point (*d*); and I trust its importance to purchasers, *under which denomination mortgagees are classed*, will exempt me from being thought digressive from the subject of this treatise, in offering such observations as appear to me to arise thereon.

If I understand the scope of the arguments of the noble Judge who decided this case, I take it to be as follows :

His Lordship first stated the importance of the question in its effect on settlements, by enabling a tenant for life, with whom, in the ordinary course of business, the title-deeds rest, by a bad mortgage to defeat all the objects of the settlement.

His Lordship then suggested "that *an idea had occurred to him*, and that, upon full con-

(*d*) *Supra.* 252.

federation,

sideration, it remained in his mind, that the plea of purchase for a valuable consideration was a *shield* to the *possession*, and that he found it very difficult to imagine a case in which it could be used for any other purpose than to defend the actual possession; and his Lordship observed, that it was very truly said by the Attorney General, that in the plea it was not said it was to maintain the possession, that no such statement could be found in any plea; for, *ex hypothesi*, the defendant was in possession of that which he sought by the *plea to defend*.

His Lordship said, “the deeds were incident to the possession. They were not considered in law as chattels, but followed and were incident to the estate in the hands of the owner. At law they belonged of right to the owner, and did not go to the executor.” It was against all conscience to refuse to describe that, which the other party, by the admission of the defendant, had a right to recover.

His Lordship admitted, “that if a court of equity was to make a mortgagee *diseaver* how he made out his title to that land of which he was in possession, there would be no conscience, no equity, no good discretion, even to enable the

the court to call upon the defendant, having paid money for the land without any notice, *a title perfectly founded in conscience*, if it had any foundation, to set forth his title.

His Lordship said, “there were cases, where the court would have no hesitation to make him, the mortgagee, describe the thing, of which he was in possession. If a mortgage was made by the owner of an estate, partly settled, partly unsettled, and during the possession of that owner the boundaries had been confounded, if a person under the settlement filed a bill to compel the mortgagee to set out, not the title, by which he claimed, *but the metes and bounds of the estate*, subject to his mortgage, no such idea could go to the extent, the defendant supposed.”

His Lordship observed it came to this: the assumption must be, that *she had a right to the deeds as a substantive property*; that was as chattels. And his Lordship asked, “where was the distinction between this and the common case of goods, for which trover or detinue lay? A person averring that he was in such circumstances, that he could not describe them, required an account to be given to enable him

him so to do. Suppose a box of jewels was *pledged* by a person, not the owner, but a mere bailee, the pawnee supposing the person in possession actually the true owner, and there being no reason to think otherwise: there would be no difficulty in a court of equity in *obliging him to explain and set out that property*, of which *he admitted* the title to be in another, only claiming the value, for which it was pledged; a description, that would make it the subject of an action at law."

His Lordship said, "it was remarkable, and he did not blame the pleadings for it, that though, where the defendant *was in possession of the lands*, he must state, that he made the purchase from a person in actual seisin and possession under a title of ownership, and it was so stated in this plea, as to the land, it was not so stated as to the title-deeds; for the language was, that he had the *disposal* of them: *so would a carrier: so a mere bailee.* That it was not a statement, that he was the owner; nor could it be so stated with truth and good conscience; for a tenant for life could not be said to have the ownership of the deeds. It was a *relative ownership*, as *incident to the title of the lands.* The *title and ownership* were in
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the plaintiff. The right was claimed, not as to a personal chattel, but *as a right incident to this mortgage;* and she was attempting to put the plaintiff under a disadvantage by retaining that, with regard to which *she could have no profit.*

His Lordship said, “it was pressed in the argument, and ought to be considered, *what these title-deeds might be.* If there were none of which the defendant could make *any advantage,* she was *without any beneficial interest or profit* to herself retaining, what *might* be a profit and advantage to the plaintiff. But there might be among them a term, which either might be attendant upon the inheritance, as a satisfied term, or a term amounting to a freehold, of which she might make advantage. If a satisfied term, *it would be absurd to let it remain* in the hands of the defendant; for the only *effect* would be to leave to the defendant what could be of *no advantage to her,* but only a vexation to the plaintiff; for if *she attempted to avail herself* of it *improperly,* though that might not appear to a court of law, it would appear to that court, and *that court* would *interfere* to prevent that improper use of it. On the other hand, if it amounted to an estate of *freehold,* which

which would enable her to get possession, he did not know, that *that* court could compel her to deliver up that. Till the discovery was made, it was impossible to know whether any relief could be given."

In order to form an opinion upon the propriety of the order made in this case, it is necessary to advert for a moment to the situation of the parties before the court, and then to inquire upon *what principles* courts of equity have *hitherto* acted in *such cases*. The parties contending were on the one side a mortgagee, who must be assumed (until the contrary be proved) to have used all necessary inquiries to ascertain the validity of the title of the person with whom he was contracting to give the security offered, and to have taken the *only precautions* that *can be pursued* in dealing with real property; that is, who had dealt with a person *in possession*, had secured to himself the possession of the title-deeds, and had paid *a full consideration* for the property to which they related. On the other side, a person claiming also for *a valuable consideration* under the same party by virtue of a previous settlement. One of these parties must suffer a loss. No reason existed as between two innocent

cent persons, in a *moral view*, why that loss should be shifted from the one and thrown upon the other (*e*), unless the laws of property so ordered it. "An hardship ought not to be decreed against one, in order to prevent its falling upon another." Now, it was clear that *at law* the person claiming under the settlement must, if the settlement was not produced, eventually have been the sufferer, for the mortgagee was in possession of such a title as would have enabled him to recover the possession against the person entitled under the settlement, if *that could not be produced*. The production of the mortgage-deed *would have entitled him to recover in ejectment*. Therefore no defence could have been made without the interference of a court of equity to compel a discovery and production of the settlement.

The settlement, therefore, in this case was, as described in a beautiful allusion by that great judge Sir Matthew Hale, *tabula in naufragio*. There was no salvation for either party, but in the possession of this plank with the possession of it, the title of either party was irresistible.

(*e*) *Per Lord Macclesfield, 1 P. Will. 747. et vid. Supra.*
211.

Under these circumstances what jurisdiction had a court of equity? Such court, it is apprehended, is dormant, unless an existing equity, preponderating on one side, calls it into action. Where was that equity in this case? The party desiring to retain, and the party wishing to acquire the settlement in question (for that was the only material deed) stood precisely in equal equity; each was justified in law and morality in struggling for the subject which both had purchased; consequently there was no motive for such court to act. Such court, it appears to me, must lose sight of the elements of its constitution, if it acted on such an occasion. The question then of ownership of the deeds was entirely out of the case; but if the ownership had been material, the legal owner of the deed was not before the court, for it is apprehended the trustees of a settlement to uses are the legal owners of the deeds; with them they ought to rest, and if in the ordinary course of business it is otherwise, "it is a usage better in the let than the observance," as it leads to great fraud.

These are the principles on which it is apprehended courts of equity have acted in cases

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of this nature, from their first institution to the present time.

The law upon this subject is clearly laid down by Lord *Nottingham*, in the case of *Sir William Basset et al'. v. Nosworthy (f)*.

The plaintiff *WB* entitled himself as son and heir of *ES*, who was the only daughter and heir of *JK*, who was brother and heir of *HK*, whose estate the lands were formerly. The defendant *EN* was a purchaser of these lands from persons claiming under the will of the said *HK*, of which will the plaintiff *WB* alledged there was a revocation by some subsequent deed or will, and for a discovery thereof, and what *EN* really paid for the purchase, and what deeds and writings he had, &c. the bill was exhibited. The defendant pleaded another bill brought in the Exchequer for the same matter, and after a full hearing dismissed, and the dismission signed and inrolled; and further, that he was a purchaser for a valuable consideration *bona fide* paid without notice of any revocation. The case was first brought on before Lord *Bridg-*

(f) 25 Car. 2. 1673. Finch's Rep. Eq. 102.

man, who had got wrong in the proceedings. It was then heard before Lord *Nottingham*, who, having set the cause right before the court, said, that upon the true merits thereof, there were only two points which were considerable.

1st. What the law of this court was concerning purchasers.

2dly. Whether the defendant was a purchaser within that law.

As to the first point: "A purchaser, *bona fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a *statute* or *mortgage*, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a court of equity by setting aside such incumbrances; for equity will *not disarm a purchaser*, but *assist him*; and precedents of this nature are very ancient and numerous (*viz.*) where the court hath refused to give *any assistance against a purchaser* either to an *heir*, to a *widow*, or to the *furtherless*, or to *creditors*, or even to *one purchaser against another*."

And

And his Lordship further observes, “ that this rule in a court of equity, is *agreeable to the wisdom of the common law*, where the maxims which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and inventions of the law, to protect the possession, and to *strengthen the rights of purchasers.*”

On the same ground Lord Keeper *North*, in the case of *Perratt v. Ballard* (g), refused to compel a purchaser of jewels, &c. from one against whom a commission of bankruptcy afterwards issued, to answer *as to the time* of the bankruptcy, saying, “ *it was an infallible rule*, that a purchaser, for a valuable consideration, without notice, shall *never discover ANY THING to hurt himself;*” and see *Brown v. Williams*, 2 Chan. Ca. 135. et *Wagstaff v. Read*, *ibid.* 156 S. L. Upon the same ground Sir *Nathaniel Wright*, Lord Keeper in the case of *Hall v. Atkinson* (h), refused to oblige a purchaser to produce a lease, which it was said *mentioned a trust*; his Lordship said it was a *side wind*, to make a purchaser produce and expose his title, and he would not do it, unless

(g) *Perratt v. Ballard*, 33 Car. 2. 2 Chan. Ca. 72.

(h) 1 Eq. Ca. Abr. 333. 4. Et Sc. Supra.

the plaintiff had made some proof towards falsifying his answer. And Lord Talbot, speaking of the rules of equity, in the case of *Collet v. Ward* (*i*), lays down this rule in these broad and unequivocal terms. “ One of these rules is, that a purchaser for a valuable consideration without notice, *having as good title to equity as any other person*, this court will never take any advantage from him, and consequently will not grant a discovery against him, of the only equity he has to defend himself by, which, if he should be obliged to discover, the other party would immediately take advantage of— And there certainly may be cases, where a purchaser, for a valuable consideration, shall not be obliged to discover any thing, (whether incumbrances that he has got in or any other thing), but all advantages shall be left to him to defend himself. Suppose two purchasers, without notice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration as himself.” Lord Hardwicke, emphatically says, in the case of *Senhouse and Earl* (*k*), “ it is “ a constant, invariable rule, that ANY mort-

(*i*) Ca. Temp. Talbot 68.

(*k*) 2 Vez. 450.

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"*gagee* may protect himself from the discovery of his title-deeds, if he denies notice."

"As to a jointress," he says, "it is otherwise, where the plaintiff claims as heir at law to the person who made the jointure, and no appearance of any settlement, the court will, upon the defendant's offer to confirm the jointure, oblige a production of the deed; but, as to a mortgagee, if the plaintiff brings his bill to redeem, ever so strongly, he is not intitled to see the mortgagee's title-deeds. Why? because a third person may find out a flaw in them. IT IS A FIRST PRINCIPLE AND NOT TO BE ARGUED, it depends, THEREFORE, on the denial of notice."

In this opinion of Lord Hardwicke, we see the extent of the *criticism* suggested by Lord Loughborough, in the case under consideration, as to the distinction between cases in which a person shall be permitted to retain property in which he has no beneficial interest, but which may be of advantage to another, and where he shall not. If, in such case, the claim of the holder of the deed be admitted and allowed, the deed shall be produced for the benefit of the party, who has a right to take

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every advantage of it, except as against the claim of the party holding it. But, unless the claim of the person holding it be allowed, if that claim be consistent with conscience, that is, if it be purchased for a valuable consideration without notice, he shall not be obliged to produce that which may discover a flaw in his title, though another be the owner of it. Then, it is apprehended, the actual ownership of the deed concealed has nothing to do with the right to call for its production against a person claiming as a purchaser without notice. Such a person has a right to use the advantage he has got either defensively, or offensively, actively, or privatively.

And it seems that a court of equity acts so strenuously in this case, in behalf of such a purchaser, that to rebut this plea *actual* notice must be made out in proof. The Court will not presume any thing against such a purchaser (*l*). Therefore, where tenant for life, sold as tenant in fee, and the settlement was produced and delivered to the purchaser him-

(*l*) Philips v. Redhill, 2 Vern. 160. *Et vid.* Gerrard v. Saunders, *infra.* in which the term being derivative, involved presumptive notice of the settlement by which it was created.

self.

self, yet the court would not affect the purchaser with presumptive notice, but dismissed the bill.

But an idea is started in the judgment now under our consideration, that this *plank* can only be made use of as a *shield* to the *actual possession*. And the Chancellor says, it is difficult to imagine a case in which it can be used for *any other purpose* than to defend the *actual possession*.

The Attorney General in arguing this case, suggested in answer to this observation, that in the plea it was not said, it was to maintain the possession. The answer given by the noble Judge, was, "that if his Lordship was right, no such statement should be found in any plea; for *ex hypothesi* the defendant was in possession of that which he sought to defend." But this seems to be *petitio principii*. A mere circle.

But Lord Nottingham considering the law on this subject, in the case of *Basset* and *Nosworthy*, states *two* purposes for which this rule was established, in analogy to the common law in its maxims, which refer to descents, discontinuances, non-claims, and collateral war-

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ranties, *viz.* to protect the possession, AND TO STRENGTHEN THE RIGHTS OF PURCHASERS, (m),

No case that I have been able to discover has set any such limits as those suggested by the Chancellor, in this case of *Strode and Blackburne*, to this plea, founded upon this rule or *first principle*, as it is called by Lord *Hardwicke* (n). On the contrary, Lord *Hardwicke* says, *any mortgagee may protect himself* from the discovery of his title-deeds, if he denies notice. Indeed, if any distinction were made in the application of this rule, between a mortgagee in possession, and a mortgagee out of possession, a singular inequity would be the consequence, and that without any reason for it. For then a mortgagee in possession would be protected in his defective title, but a mortgagee out of possession would be defeated; and yet there is no equity in favour of the one,

(m) *Vid. Supra.* 659.

(n) Sir J. Burlace *v.* Cook, 2 Freem. 24. Millard's Case, *ibid.* 43. Seymour *v.* Nosworthy, *ibid.* 128. More *v.* Mayhow, *ibid.* 175. Sc. 1 Ca. Chan. 34. Shortly *v.* Fag, *ibid.* 68. Meynell *v.* Garraway, Nels. Rep. Chan. 63. Heyman *v.* Gomeldon, Finch, 34. Cantrell *v.* Manganston, *ibid.* 219.

more than in favour of the other; for a mortgagee does not, in the ordinary course of things, take possession; the nature of the contract does not require it; it is contrary to the intention of the parties (*o*). A mortgagee only takes the legal estate as a security; if it were otherwise, no person would lend his money upon such terms. A mortgagee would say, he would have nothing to do with the management of the estate: it is generally stipulated that the mortgagor shall retain possession till the mortgage is forfeited. The omitting to take possession, therefore, does not expose a mortgagee to the imputation either of fraud or negligence. But a new system must be adopted by mortgagees, if this plea be thus qualified, or they must renounce the benefit of this rule, which equity has established *to strengthen the rights of purchasers.*

But it does not rest merely upon the absence of any such allegation in the plea, but there are several authorities and cases which in fact decide the point the other way.

In the case of *Brampton and Baker*, in 1671, stated in a former part of this treatise (*p*), we

(*o*) *Vid. Supra.* 210.

(*p*) *Supra.*

find

find the very case in terms. A mortgage by a tenant for life, to one, who *actually* had *seen* the deed of settlement, but had been advised that the tenant for life could destroy the contingent remainders, whereas in truth the remainders had vested, by the birth of a son a day or two before ; but of which the mortgagee had no notice. But the mortgagee having got the deed of settlement, the Court would not relieve against a purchaser, but dismissed the bill. And in the case of *Seybourne v. Clifton* (*q*), where the plaintiff and defendant had each of them purchased a *reversion*, expectant on the death of tenant for life, (consequently neither of them were in possession,) the plaintiff's bill that he might examine his witnesses to preserve their testimony, and might be permitted to try his title in the life-time of the tenant for life, was dismissed ; for as the purchaser was a defendant, the court would do nothing in it, and the plaintiff lost his land for want of examining his witnesses : *et vid. Beckwenall v. Arnold*, 1 Vern. 354. S. L. And Lord *Hardwicke*, in the case of *Willoughby and Willoughby* (*r*), observes, speaking of se-

(*q*) Cited by Lord Rawlinson, 2 Vern. 159.

(*r*) *Supra.*

vering a term to attend the inheritance from the inheritance, " if such a purchaser (that is, a purchaser for a valuable consideration, *bona fide*, not affected with any fraud or collusion,) has no notice of a prior incumbrance, and takes a defective conveyance of an estate, and an assignment of a term to attend the inheritance, in this case he shall have the benefit of the term to protect his estate. And he may either *defend his possession by it*, or he may *use it to recover his possession at law*, though his adversary has the inheritance, which makes me (Lord Hardwicke) say, that this Court often disannexes the term from the inheritance. This is the meaning when it is said, " that if a man have law and equity on his side, he shall not be *hurt here*."

The last case I shall cite upon this point, is that of *Gerard v. Saunders*. The facts in this case were, that in 1711, *J H* seised in fee, (s) demised to *G* for a term of 1000 years, which about the year 1730 being by *mesne* assignments vested in *H*, subject to a mortgage to *B*, was purchased by *C J*, and by indentures between the mortgagee *H*, *C J* and his trustees some time in the year 1730, the more particular date whereof the plaintiff had not been

(s) 2 Vez. Jun. 454.

able

able to discover, as such deed was in the custody of the defendant, the premises were assigned for the remainder of the term in trust for *CJ for Life*, remainder to *TJ* and *S* his wife, for the lives of them and the survivor, remainder for all and every the children of their bodies, &c. with divers remainders over. *CJ* held till his death in 1749, then *TJ* entered and held till his death about 15 years before. His wife died in his life, and the plaintiff as their only surviving child entered. The defendant, under colour of some mortgage from *TJ*, had got in his possession the settlement of 1730, and other title deeds, and had filed a bill of foreclosure and brought two ejectments. The bill charged notice of the settlement and its contents on the defendant, and other special circumstances, and prayed that the defendant might answer, and produce the settlement and all other title deeds, &c. and an injunction from proceeding at law. The defendant pleaded a mortgage without notice actual or constructive; which plea had been over-ruled on a former hearing, because the facts from which notice was inferred, were not denied. An answer was then put in, to which a great number of exceptions were taken. The point came before the Court, on exceptions to the Master's report upon the exceptions to

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the answer : Lord *Loughborough*, Chancellor, after stating that Lord *Nottingham* had laid it down, “ that against a purchaser for a valuable consideration, the Court of Chancery had no jurisdiction ; and that *Fag's* case was determined by him : That the defendant in that case had picked up from the conveyancer's table the deed that affected his title ; and though he got it in that manner, Lord *Nottingham* would not oblige him to set it forth. Lord *Loughborough* said, a case that occurred to his recollection produced many points, it was *Basset v. Nosworthy* (*t*). His Lordship said, the book did not state it amiss, and he cited the passage before-mentioned.

His Lordship said, he was *perfectly satisfied* upon the *general* reasoning, that Court would never extend its jurisdiction to compel a purchaser, who had fully and in the most precise terms, denied all the circumstances mentioned, as circumstances from which notice might be inferred, to go on to make a further answer as to all the circumstances of the case, that were to blot and rip up his title. To do so would be to act against the known established principles of

(*t*) *Vid. Supra.* 657.

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that Court. His Lordship thought it had been decided, that against a purchaser for valuable consideration without notice, that Court would not take the least step imaginable. His Lordship said, he believed it was decided, that you cannot even have a bill to perpetuate testimony against him. He was pretty sure, it was determined, that no advantage should be taken from him by that Court. The doctrine as to the jurisdiction of that Court was this: you cannot attach upon the conscience of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill. And his Lordship allowed the exceptions to the report.

The manner also in which this defence is used, shews that possession has nothing to do with it. For the defendant denies notice, which denial of notice must be by way of answer, which answer must meet the allegations of the bill, and the plea is founded on the answer, and alledges seisin and possession, (*not in the purchaser*), but in the person from whom the purchase is made. Therefore if the bill alledges that the defendant had notice at or before his taking the conveyance, the answer must deny the

the fact as stated; *viz.* that the defendant had notice before that time: *vid. More v. Mayhew*, 1 Chan. Ca. 34. Sc. 2 *Freem.* 175. Anonymous Case, 2 Chan. Ca. 161. *et Trevanian v. Moſſe*, 1 *Vern.* 246. Now it appears to me to follow of course, that if, *an instant* after the money paid, and conveyance made, the defendant had notice, (*i. e.* before he could possibly have actual possession, unless the deeds were executed on the lands, which is rarely the case) the purchaser might the next moment put in this plea to a bill by a prior purchaser to discover title deeds.

The Chancellor, in the principal case, puts two instances to illustrate the grounds upon which his decision is founded. The first, if I understand it, is the case of a mortgage of an estate partly settled and partly unsettled, the boundaries of which had been confounded during the possession of the owner. In such case, his Lordship observes, this plea could not be carried to the extent the defendant supposed. The observation that presents itself on this instance is, that if the mortgagee understood he was taking a mortgage of settled and unsettled estates, his Lordship's conclusion is strictly correct, this plea would not protect the mortgagee from

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from setting out the boundaries. But if the mortgagee had not notice that part of the estate was in settlement, the instance put involves merely the present question on another case similar in its nature, and subject to be decided on the same principles.

A case nearly similar occurs in the Books, which, in the instance of a purchaser without notice, militates the other way: I allude to the case of *Snelling v. Squib* (v), where *A* had a judgment against *B* of 1200*l.* for payment of 500*l.* *C* purchased of *B* for a valuable consideration without notice. *A* sued *C* to discover lands subject, &c. that he might extend them, not knowing the place nor who were the tenants. *C* pleaded his purchase for a valuable consideration without notice. The Lord Chancellor allowed the plea; for such purchaser should not be hurt in Chancery against the plea, and therefore *C* should not be obliged to discover what lands were liable. And the Reporter says, "It was much debated and objected that a judgment binds the land whoever had it." And the plaintiff's bill was not to have a decree for his debt, or to have the land, but to discover the same whereby at law he might recover his debt.

(v) *Snelling v. Squib*, 32, 33, Car. 2. 2 Ca. Chan. 47.

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The second case put by Lord *Loughborough* is an instance of personal chattels pledged by a person, not the owner, but who had a qualified interest therein. This case is distinguishable from the principal case, in as much as value paid gives no title to such property, unless it be transferred in market overt; consequently, unless the transfer be made in market overt, the holder is no purchaser. But if the purchase was regularly made, the case of *Abbey and Williams*, 1 Vern. 27, seems to warrant a contrary conclusion upon the facts stated, than that which is drawn from similar ones in the judgment in *Strode and Blackburne* (u). In the case to which allusion is now made, the bill set forth, that *A* being indebted to the plaintiffs and others, a commission of bankruptcy issued against him the 16th of November, 1780, and that several suits of tapestry of his were in the defendants hands, which the commissioners had assigned to the plaintiffs for the benefit of his creditors, and that they ought to have an account thereof; but that the defendant pretended they were pawned or sold to him by the bankrupt without any trust; whereas it was on a trust, and done to conceal them, and so prayed a discovery and relief. The defendant pleaded

(u) 1 Vern. 27.

X x

that

that neither he nor any in trust for him had, nor ever had, any goods belonging to the bankrupt, but what the defendant bought *bond fide* for a full value in money really paid by the defendant to the bankrupt, or his order, before any commission was sued out against him, and before the defendant had any notice that he was a bankrupt, or had done any act of bankruptcy, and without any trust or condition, other than that the defendant by parol did declare, that if the bankrupt paid the money paid him by the defendant, and interest for the same, at the time agreed on, and then past, that then the defendant would re-deliver the goods to him; and averred that the bankrupt failed to pay the money, or any part of it, at the time agreed on. And that the bankrupt, two years since, agreed that the same should be sold by *J S*, and that by the money so to be raised, the defendant should be paid his money with interest, and the surplus to the bankrupt; and averred that the money raised by sale was 200*l.* short of what the bankrupt owed him, and which 200*l.* was still due. And that the 19th of October, 1680, the defendant gave the bankrupt a general release to that time; and that the defendant had no dealings with him since. And the defendant further pleaded, that he had been

examined by the commissioners, as far as by law he was obliged; and insisted, that being a purchaser so as aforesaid, he ought not to be put to answer, to subject himself to an action, which the bill aimed at, by pressing a discovery of what goods of the bankrupt came to the defendant's hands. The Lord Chancellor allowed the plea, and said the law was hard against tradesmen that dealt with bankrupts before notice; and the assignees *ought not* to be assisted *in equity* in any such case.

And in the case of *Wagstaff v. Read* (*x*), which arose on a bill for a discovery against one who had purchased goods of another, against whom a commission of bankruptcy had afterwards issued, and who was said to have purchased them under their value. The Lord Keeper inclined to make the defendant discover what goods he had had, and at what price. But the defendant's counsel objecting that this would destroy and prejudice the purchaser, though he paid the full value; for if he discovered what he paid, the commissioners would assign the money, and so the court should be instrumental to wound the purchaser. If the plaintiff could help himself at law, by the aid of the

(x) 2 Chan. Ca. 156.

statute of bankrupts, he might, and the court would not hinder him, *but not aid him there.* The Lord Keeper ordered, that the defendant should answer what and how much he paid, so as the plaintiff did consent to take no advantage of the discovery, but in that court and not at law, which the plaintiff consented to by his counsel, and was to subscribe his consent with the register, and then the defendant was to answer.

So (*y*), where a bill was to discover whether a lease made in Queen *Elizabeth's* time for 99 years, in trust for Dr. *L*, to commence after the estates then in being were determined, was not effluxed in point of time, and charged, it would so appear by deeds and writings in the hands of the defendant, the assignee of the lease, and that he knew the lease was expired, but refused to discover. The defendant pleaded the lease, and that he was informed, that in *seventy-seven*, when he purchased, there were *fifty-seven* years to come in the lease, and therefore gave after nineteen years purchase for it, and *consequently* ought not to make any discovery to impeach or weaken his title. And the plea was allowed, and a demurrer also.

(*y*) *Bishop of Worcester v. Parker, 2 Vern. 255.*

I have

I have now gone through the argument, and, with great deference to its illustrious author, I cannot but submit it as my opinion, that from the authorities extant upon the subject, it appears that the law is to be found in the judgment on the case of *Gerrard and Saunders*, and not in that of *Strode and Blackburn*.

Where a mortgagee (z), after notice of a subsequent mortgage, joined with the mortgagor in sale of the lands to a stranger, it was resolved, that the money received by either, for the purchase, should sink so much of the mortgage-money.

A purchaser for a valuable consideration shall hold (a), or take place, against a prior voluntary settlement, though he hath express notice thereof at the time of his purchase; such voluntary settlement being made void, against a purchaser, with or without notice, by the 27th *Eliz. c. 4.*

Therefore, if a man make a voluntary deed, and then a mortgage of the same lands, the

(z) *Bentham v. Haincourt*, Prec. Ch. 30.

(a) *Tonkins v. Ennis*, 1 Eq. Ca. Abr. 334. 6. Cowper's Rep. 280. 711. *Gardiner v. Painter*, Sel. Ca. Ch. 65. *infra*.

first deed is fraudulent, as against the mortgagee.

A conveyance in trust for payment of debts generally, to which no creditors are parties, is a voluntary conveyance; consequently void against a purchaser for valuable consideration with or without notice (*b*).

So, if a man make a conveyance to another in trust, to pay all his debts *mentioned in a schedule*, and all his other debts: As to all the debts not mentioned in the schedule, it is voluntary (*c*).

But although a conveyance be at first fraudulent, the fraud will be purged, if it be afterwards conveyed over upon valuable consideration, *bond fide* (*d*).

A mortgage made by *K* in 1659, by divers *mesne* assignments vested in *N* (*e*); it was ob-

(*b*) *Langton v. Athley*, Nelf. Rep. Eq. 126. *Leech v. Leech*, 1 Ch. Ca. 249.

(*c*) *Ibid.*

(*d*) *Comber* 222, 249. 3 *Lev.* 388.

(*e*) *Andrew Newport's Ca. Rep.* T. Holt, 477. *Sc. Skinner*, 423. *Et vid. Kirk v. Clark, et al. Pre. Chan.* 275.

jected that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though *N* paid a valuable consideration, yet this would not purge the fraud, and make it good against one, who was a purchaser *bond fide*, and for a valuable consideration *sed non allocatur*; for *Holt*, Chief Just. said, that the first mortgage was good between the *parties*, and being so, when the first mortgagee assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and therefore was within the proviso of the statute 27 *Eliz. c. 4*, "that no mortgage, *bond fide*, and "upon good consideration, should be impeached "by force of this act, but it should stand in "such force as before the act made;" and if this proviso did not extend to this case, to what case should it extend?

And if a valuable consideration passes, the Court in such case will not enquire rigidly into its adequacy, where the object is a family settlement.

Therefore, where the defendant's father (*f*), some time after marriage, in consideration of an additional portion of 100*l.* paid by his wife's mother (a receipt whereof was indorsed upon the deed), settled an estate of 100*l. per annum* upon himself for life, remainder to his first and other sons, &c. and the mother of the defendant's father having an interest in this estate, joined with him in the conveyance; and the father, thirteen years afterwards, mortgaged this estate, with the usual covenants to the plaintiff, and died, the plaintiff brought his bill to foreclose: And the question was, whether the settlement should be looked upon as voluntary and fraudulent against a creditor, who lent his money so many years after? *Et per Curiam.* The question is, whether this be a voluntary conveyance or not? here is plain proof that 100*l.* was paid, the receipt being indorsed upon the back of the deed for a consideration of 100*l. per annum*; yet in marriage settlements, things are not to be considered so strictly, there being room for bounty; and every man ought to provide for his wife and family. Besides, in this case there was an estate which moved from the defendant's father's mother, and she might in some respect be considered as

(*f*) Jones v. Marsh, Rep. T. Talb. 64.

a pur.

a purchaser of the limitations made to her grand-children; so that it would be very hard to call this a fraudulent settlement, since it was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations, which could not be called voluntary against a creditor, who lent his money thirteen years after.

CAP. XV.

TO WHOM LANDS FORFEITED, UNDER A MORTGAGE, SHALL BELONG.

GREAT doubts were formerly entertained, when a mortgage was made upon condition, that if the mortgagor, at a certain time, paid a certain sum to the mortgagee, his heirs, executors, or administrators, then the mortgagor should re-enter (*a*), and the day passed without payment, and the mortgagee died, whether the money should be paid to the heir or executor of the mortgagee? And a distinction was taken between cases (*b*), where there appeared to be a

(*a*) *Vid. Hard. 467.*

(*b*) 1 Eq. Ca. Abr. 326. Pl. 1, 2. 1 Ch. Ca. 88.
2 Ch. Ca. 187.

bond

bond for payment of the money, and the condition of the redemption was upon payment to the executors without naming the heir: and those where the mortgage was in fee (*c*), and there was neither bond nor covenant for payment, or where the condition of redemption was, upon payment to the heir or executor, or heirs and assigns of the mortgagee, and there was no deficiency of assets to pay creditors. For, in the latter cases, the money was decreed to the heir, in the former to the executor; because, upon these circumstances, the Court determined whether the mortgagee meant to change the nature of his property, from personal into real (*d*). But, since courts of equity have considered contracts on mortgages as merely personal, it hath been settled otherwise; and now it is a rule, *in all cases*, that the mortgage money shall be deemed part of the personal estate, and belong to the executor or administrator, *unless* an intention be declared by the mortgagee, or it appears evidently, from his conduct, that it should not be so considered; as if he foreclose or obtain a release of the equity of redemption, and get actual possession of the premises.

(*c*) *Tilly v. Egerton*, 1 Rep. Ch. 181.

(*d*) *Turaer v. Turner*, 2 Rep. Ch. 155. *Turner v. Crane*, *ibid.* 242. *Sc.* 1 Vern. 170.

Thus,

Thus (*e*), where *C* lent *B* 500*l.* upon a mortgage by lease and release, and it was agreed, by a separate indenture, that if *B* should, during his life, pay *C*, his heirs, executors, administrators, or assigns, 30*l.* by half-yearly payments, at *Lady-day* and *Michaelmas*; and if the heirs of *C* should, within six months after his death, pay to *B*, his heirs, executors, administrators, and assigns, the said sum of 500*l.* then the lease and release to cease and be void. *B* died, leaving other assets, and, default having been made in payment, and the premises being thereby forfeited, the mortgaged lands descended to his son. On a bill exhibited for redemption, the principal question was, whether the mortgage-money should be paid to the heir, or to the personal representative? And it was decreed that it should be paid to the latter; because the reason of the common law, in these cases, ought to be followed, in equity, as nearly as might be. And, at common law, if conditions or defeasances of mortgages were so penned as to make no mention either of heirs or executors, the money ought to be paid to the executors;

(*e*) *Thornborough v. Baker, et al.* 1 Ch. Ca. 283. *Noy v. Ellis*, 2 Ch. Ca. 220. 2 Vent. 348. Hard. 467. *Canning v. Hicks*, 2 Ch. Ca. 187. *Infra.* 302. *Wynne v. Littleton*, 2 Ch. Ca. 51, 52.

for it came out of the personal estate, and therefore ought to return thither again; it being equitable, *that the satisfaction should accrue to that fund which sustained the loss.* But where the defeazance appointed the money to be paid to the heirs or executors, *disjunctively,* if the mortgagor paid the money precisely at the day, he might elect to pay it to either of them; for that would have been a performance of the condition, which was all he had to do. But, when the precise day was passed, and the mortgage forfeited, all election was gone in law; for, in law, there was no redemption. And when the case was reduced to an equity of redemption, it would be perfectly against equity to revive the election of the mortgagor; because that would only tend to a delay of the payment of the money as long as he pleased, and end in compositions to pay the money into that hand which would use him best. And, to say that the election should be in the Court, would be to place an arbitrary power therein, which would tend to the inconvenience of the subject; since no man could safely pay the money, in such cases, without a suit in equity. And therefore, since there ought to be a certain rule, a better could not be chosen than to come as near as might be to the rule and reason

of the common law; and as the law always gave the money to the executor, where no person was named or where the election to pay, either to the heir or executor, was gone and forfeited in law (in which latter case, it was the same as if neither heir or executor had been named in the condition) so equity, following the rules of the common law, ought to give it to the executor. For, in natural justice and equity, the principal right of the mortgagee was to his *money*, and his right to the *land* was only as a deposit or pledge for it; therefore, the money ought to be paid to the proper hand that the mortgagee had appointed receiver of it, which was his executor. And then the heir, who was only a trustee to keep the pledge, ought to deliver it back to the mortgagor; for, though the heir had the use and benefit of the land, until redeemed, yet he had it only as a pledge; consequently, was a trustee to restore it when the money was paid to the proper hand; and the heir himself, though he was proper to keep the pledge, being land, yet was not proper to receive the money, being purely personal. Nor was it hard that the heir should part with the land without having the money that came in lieu of it, because the money was originally parted with from the personal estate, and would have immediately come into the hands

hands of the executor, had it not been placed out in real security ; and the right to receive a sum of money (*f*), the payment of which was a personal duty independent of the condition of the mortgage-deed, ought always to be certain, not variable upon circumstances. Therefore it was not material, in this case, that the personal representative had assets without this money ; for assets or not assets was not the measure of justice to executor or administrator, but served only as a pretence to favour the heir, who either ought to have the money, if there were no assets, or ought not to have it, although there were. For the same reason it was not material, that there wanted the circumstance of a personal covenant from the mortgagor to pay the money ; for though the case of the administrator of the mortgagee would have been stronger with it, yet it was strong enough without it. In this case, a distinction was taken between a mortgage, and an absolute conveyance with a collateral agreement to re-convey upon re-payment of the purchase-money ; and the Court said, that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagor, in his lifetime, or by his last will, did otherwise declare and dispose of the same.

(*f*) *Vid. Supra.*

So,

So, where a mortgage was made in fee, and descended to the *heir at law of the mortgagee*, which *heir at law* had been paid the money ten years before application made for it, by the *personal representative* of the mortgagee; on the latter exhibiting his bill, he had a decree for it, but without interest (g).

And if the mortgage be in fee (h), conditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage forfeited, in consequence of which, the mortgagor has his election to pay the money to either; yet it will belong to the executor.

And if there be *several* executors, any or either of them may, before probate of the will as well as after, receive, and give a good discharge for the money (i).

So, in all mortgages in fee, a man's heirs are trustees for his executors (k).

The bequest of a specific legacy to the executor, was held not to bar him of money due on

(g) Turner's case, 2 Vent. 348.

(h) Sir Thomas Littleton's Case, 2 Vent. 351.

(i) Austin v. Executors of Dodwell, 1 Eq. Ca. Abr. 319.

(k) Barnard. 50.

mortgage.

mortgage (*l*). Thus, where a mortgagee in fee, after devising several legacies, gave 100*l.* to his executor, *expressly willing, that he should not be paid until after his debts and other legacies were discharged;* it was argued, in favour of the heir at law, *that it was a necessary implication that the executor should have no more than the 100*l.**; for it was the same as if he had expressly devised the 100*l.* out of the residue of his estate, after his debts and legacies paid; from which it might be strongly inferred, he meant no more than that sum, and not the whole residue. But the Court decreed against the heir.

And, if the mortgagor doth not redeem (*m*), the administrator shall have the land. Thus, where the mortgage was forfeited, the heir in possession by descent, no want of assets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his administrator; for as the money, being part of the personal estate, would have gone to him, so would the land, which was in lieu thereof.

(*l*) Canning *v.* Hicks, 2 Ca. Ch. 187. Sc. 1 Vern. 412.
Sed vide 14 Geo. 2. c. 20. s. 9.

(*m*) Ellis *v.* Gnavas, 2 Ch. Ca. 50. Canning *v.* Hicks,
supra.

Y y

So,

So, where a mortgage was made of a copyhold (*n*) by a surrender thereof to *P*, who was admitted tenant, and died in 1690, leaving *T*, her son and heir and executor; *T* entered and was also admitted, and afterwards, by his will, but without any surrender to the use thereof, devised it to *G*, who was also administrator *de bonis non* to *P*; then *G* exhibited his bill against *K*, who was heir at law both to *P* and *T*, and who claimed this as a real estate, it having been so long since forfeited, two descents having been cast, more being due thereupon than the value of the estate, the mortgagor, by answer, having refused to redeem and submitted to be foreclosed, and the devise by *T* to the plaintiff being void, at law, for want of a surrender to the use of the will. But it was decreed to the plaintiff, as administrator *de bonis non* to *P*; and the decree was affirmed upon appeal, there being no foreclosure nor release of the equity of redemption, in the life-time of the mortgagee.

Although a mortgagor (*o*), the mortgage being forfeited, releases to the heir of the mortgagee in fee, yet the administrator shall have the

(*n*) Tabor *v.* Grover, 2 Vern. 367. Sc. 1 Eq. Ca. Abr. § 28. Wood *et al.* *v.* Nosworthy, cited 2 Vern. 193.

(*o*) 2 Vern. 193.

benefit

benefit of that estate, even though there be no debts. And so it is in case a mortgagor be foreclosed, or that the mortgage be of so ancient a date, as in the ordinary course of the court, it be not redeemable; *for, in case the mortgagee be not actually in possession, it will be looked upon to be personal estate.*

And, where there was husband and wife (*p*), and the wife, having a mortgage in fee of a copyhold, died leaving issue, which issue was admitted and died, and then the husband, as administrator to his wife, claimed title to the copyhold, being a mortgage, and so part of his wife's personal estate: it was decreed to him against the heir at law, although the latter had been admitted.

So, a mortgage of an inheritance, to a citizen of *London* (*q*), hath been held to be part of his personal estate, and divided according to the custom.

But if a mortgagor agrees to convey his equity of redemption to the mortgagee (*r*), and

(*p*) *Turner v. Crane*, 1 Vern. 170.

(*q*) 1 Ch. Ca. 285. 1 Vern. 4.

(*r*) *Tilley v. Egerton*, 3 Chan. Rep. 35.

dies before the agreement is executed, the heir of the mortgagor shall have the money.

But, if the possessor of the estate *apprehends* himself to hold it in fee, his interest will not be considered as personal, against his evident intention. As, if a mortgaged estate be sold by the mortgagee, to a third person, who means to realize, but is deceived in his purchase; the money paid by him will, on repayment, go as the estate would have done. For, in this case, the intention of the vendee is to alter the nature of his property, and to invest his personal estate in the purchase of land; and therefore the Court will consider it *as land*, when, by an accident, his intent would otherwise be frustrated.

Thus, where a mortgagee in fee entered (*s*), and, after seven years enjoyment, sold the lands absolutely to *I S* and his heirs; the Court decreed, that the estate should not be looked upon to be a mortgage, in the hands of *I S*, so as to make it part of his personal estate, but should be deemed real property for the benefit of his heir.

So, if it appears to be the intention of the mortgagee, that the mortgage should pass, by

(*s*) *Cotton v. Ifles*, 1 Vern. 271.

devise,

devise, as a real estate, the executor will not be entitled (*t*).

As, where the testator (*u*), having several mortgages, and among the rest, a mortgage in fee of lands in *F*, devised his mortgages to his two daughters, their executors, and administrators, and his lands in *F*, upon which he had entered upon forfeiture of the mortgage, to them and their heirs; *M*, one of the daughters, dying without issue, *H* her husband and administrator, claimed a moiety of the lands in *F*, as part of his wife's personal estate, it being a mortgage not foreclosed, or the equity of redemption released. But it was held, that, although it was a mortgage, as between the mortgagor and mortgagee, yet the testator's intent was, that it should pass to his daughters, as a real estate to them and their heirs, and not as part of his personal estate; and that *M*, the wife of *H*, being dead without issue, it descended and went to her sisters, as her heirs at law; and that *H*, as administrator to his wife, ought not to have any part thereof as personal estate.

But where a mortgage was devised as real estate, after a decree of foreclosure *nisi*, it was

(*t*) *Martin ex dem. Weston v. Mowlin*, 2 Burr. 969.
infra. 694.

* (*u*) *Noys et ux. v. Mordaunt et al.* 2 Vern. 581. Sc.
Gilb. Rep. Ch. 2. Ch. Prec. 265.

held to be personal estate for payment of debts (*x*), if assets fell short, though considered as real estate between devisor and devisee.

But a mortgage will not pass *as land* under a general description, applicable to it in point of locality, if there be other circumstances sufficient to shew, that the owner considered it as personal property.

Thus where *A B*, and *R B* his wife (*y*), entitled to certain copyholds of inheritance, situated in the manor of *Wyke Regis*, surrendered the same to *W* on mortgage, and the mortgagee entered thereupon, and was in possession at the time of his death; the money was not paid according to the condition of the surrender, and the equity of redemption of the estate was not foreclosed or released during the life of *W*. But *W* surrendered the estate, and divers other copyholds in the said manor, and after describing several other coyyhold estates, the surrender proceeded thus, “*ac etiam un’ claus’ pasturæ de novo inclusum, continen’ per estimationem duo-decim acres, &c. &c.*” describing the premises in mortgage. *Nec non totum statum jus titulum*

(*x*) *Garrett v. Evans. Supra.*

(*y*) *Martin v. Mowlin, 2 Burr. 969.*

interesse clam' et demand', quæcunque prædict' *W*, tam in lege quam in æquitate de, et in præmissis prædict, et qualibet in de parte et parcella ad opus et usum prædicti *W* pro termino vitæ suæ, et post ejus deceffum, ad opus et usum talis personæ sive personarum cui vel quibus et pro tali statu sive statibus qual' ipse prædictus *W*, per ultimam voluntatem suam aut per aliquod aliud scriptum, &c. dabit, devisabit, limitabit, declarabit sive appunctuabit; et pro defectu talis donationis, &c. ad opus et usum rectorum hæredum ipsius *W* in perpetuum secundum consuetudinem manerii prædicti. Super quo, ad istam eandem curiam venit prædictus *W*, et cepit de dominis et firmar' prædictis præmissa prædicta superius sursum redditâ cum omnibus et singulis eorum pertin', habend' tenend' omnia et singula præmissa prædicta cum suis perti' præfato *W*, pro termino vitæ suæ, et post ejus deceffum, tali personæ, sive personis cui vel quibus, et pro tali statu sive statibus qual' ipse prædictus *W*, per ultimam voluntatem suam, aut per aliquod alium scriptum sub manu et figillo suis, dabit, devisabit, &c. prout superius limitatur et pro defectu inde, rectis hæredibus ipsius *W* in perpetuum, secundum consuetudinem manerii prædicti: SUBJECT' tamen separalibus CONDITIONIBUS in quibusdam copiis rotulo-

rum cur' manerii præd' mentunat' quarum se-
peral' dat' sunt prout, &c: &c. Afterwards
W made his will, and therein, after a variety of
devises and bequests, proceeded thus: "And
whereas *R B*, widow, stands indebted to me, in
a considerable sum of money, I do hereby ap-
point and give her twelve months time after my
death to pay the same, and do give her 5*sol.* to
be allowed out of the same debt." And then
proceeds, "*Item, ALL* my lands, tenements,
and *hereditaments, WITHIN, AND PARCEL*
OF THE SAID MANOR OF WYKE REGIS, and
also all other my lands, tenements, and heredi-
taments, in the County of *Dorset* (charged as
above-mentioned) I do give and devise unto my
son *H W*, and unto *A* his now wife, and to the
heirs of the body of my said son *H W*, on the
body of the said *A* lawfully begotten, and, for
default of such issue, unto my right heirs for
ever. *Item*, I give and bequeath to my said son
H W, all my goods and chattels, and personal
estate whatsoever; he paying my debts, and
legacies, and funeral expences." And one ques-
tion, necessary to be decided, was, whether the
testator meant to devise this mortgage, as part of
his real or personal estate? *Et per Lord Mans-*
field, as to the construction of the will of *W*, if
it appeared, that the testator really meant and
intended

intended to devise the mortgaged premises as land, it would then be a devise of land; the mortgage being forfeited by law, and the estate in the land become absolute. But if it appears that the testator meant and intended it as a bequest of money only, then it would be considered in a Court of Equity, as a specific bequest of the money: and a Court of Equity would not direct the money to be laid out in land, without express words in the will to ground such direction upon. It seems to me, that the testator all along understood this to be part of his personal estate, and that he meant to dispose of it as such by his will. He surrendered it as charged *with a condition of redemption and resurrender.* And in his will, he manifestly considered it as a debt due from *Rachel Buckler*, and that debt as part of his personal estate. Though the testator has not in his will mentioned this estate to be redeemable, yet he has done so in the *surrender to the use* of his will, he surrenders it as liable to a condition in equity (for at law it was become absolute) and there had not run above eight or nine years upon this mortgage, when he made this surrender; so that he appears to have made the surrender of it, only to substantiate his claim upon the estate, and upon the face of the surrender plainly considered it as *redeemable.*

redeemable. And so he did in his will too. We must take it upon the will, that the widow *B*, owed him no other debt but this: *de non existentibus, et de non apparentibus eadem est ratio.* He gives her time to pay it; he gives her a specific legacy out of it; he gives it as a debt towards payment of his debts and legacies: “I give and bequeath to my son *HW*, all my goods, chattels, and personal estate whatsoever, he paying *my debts, legacies, and funeral expences.*” And there is nothing to controul this, but the general words, “all my lands, tenements, and hereditaments, within, and parcel of the said manor, &c.” But his *creditors* and *legatees* had a right to have it considered as *personal* estate. Therefore, we all agree in opinion, “that he meant to pass it as a *DEBT:*” and there is no colour to imagine, that it could be considered in a Court of Equity, as a specific bequest of money, which they would direct to be laid out in land,

And, where money secured by a mortgage (to which the executor was legally entitled) was articled to be laid out in land (*z*), and settled on the issue of the marriage, it was by *Hale*, Chief Justice, on a special verdict, adjudged to be bound by the articles.

(*z*) *Laurence v. Beverly*, cited 3 Will. 217.

If two persons advance a sum of money on mortgage (*a*), and take the mortgage to themselves *jointly*, without inserting in the deed the words *to be equally divided between them*, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him that is dead shall have a proportion, because, from the nature of the transaction, the Court presumes this to be the intention of the parties.

Thus, where *N* and *S* lent 2000*l.* to *G*, on mortgage (*b*), 1450*l.* whereof was the money of *S*, and 550*l.* the residue, the money of *N*, and it appeared, by a note under both their signatures, that the 1450*l.* was delivered by *S* to *N*, and that, if the mortgage was paid off, then the 1450*l.* with interest thereon, was to be re-delivered into the hands of *S*, for the uses of his will. Afterwards, and before the day of redemption, *S* made his will, reciting the above memorandum, and disposed of his share thereby. The lands were redeemed on the day, and the whole money and interest paid to *N*, *S* being dead, and he claiming it by survivorship. But, on a bill exhibited by his executor, the Court

(*a*) 2 Vez. 258.

(*b*) Petty *v.* Styward, 1 Ch. Rep. 31. 1 E. Ca. 290. *Et*
see 2 Vez. 258.

was clearly of opinion, that by equity, there ought to be no survivorship in a case of this nature; and that the note, under the hands of both the parties, and the will of *S*, shewed plainly that there were a trust between them, *that* on repayment, each of them was to have his money, with interest.

The consequence of the above principle is, that the executors of the deceased mortgagee should, on transferring or re-transferring the mortgage, be a party to direct the surviving trustee to convey; for the surviving mortgagee is a mere trustee for the executors of the deceased mortgagee.

And if two persons, being mortgagees (*c*), foreclose the mortgagor, the mortgaged estate shall be divided *between* them, because their *intent* is *presumed* to have been, that it should be so divided.

(*c*) 2 Vez. 258.

C A P.

CAP. XVI.

HOW A WIFE IS INTERESTED IN HER HUSBAND'S ESTATE MORTGAGED, AND OTHER MATTERS RELATIVE THERETO.

BY the common law a married woman could not, by joining with her husband in any deed or conveyance whatsoever (*a*), bar herself of that portion of her husband's real property, which the law hath provided for her support in case she survives him. And it was formerly held (*b*), that a married woman did not bar herself of her right to dower, by joining her husband in a fine; but the case is now altered in that respect,

(*a*) *Cruise on Fines* 130.

(*b*) *Plowd.* 373. 2 *Rep.* 93. *a* 10—40. *b. vid. Glanv.*
lib. 2. c. 3. Ibid. 133.

as it hath been long settled that, if a husband and wife join in levying a fine of the husband's estate, the wife is thereby barred from claiming her dower out of the lands which are comprehended in the fine. Because she having nothing in these lands in her own right, her joining her husband in a fine, could be for no other purpose, but to bar herself of her dower; but a fine levied by the husband alone, does not bar his wife of dower.

A woman may also bar herself of her jointure (*c*), by joining her husband in levying a fine of it, provided it be made pursuant to the statute 27th *Hen. 8*, and be a good bar of dower; because the wife, by accepting such a jointure before marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death, but her jointure, which she herself concurred in destroying. But, if a jointure be settled on a woman after marriage (in which case it is no bar of dower) and she joins her husband in levying a fine of it, this will not prevent the wife from claiming dower out of any other lands, whereof her husband was seised during the *coverture*; because, the jointure being no bar of dower, the wife had her election on her hus-

(c) 1 Inst. 36. 2. Dyer, 358. a.

band's

band's death, either to accept of the jointure, or to claim her dower. And therefore Sir *Edward Coke* says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

And if a married woman join her husband in a fine, it will bar her of any particular interest she hath in lands comprehended therein, as well as from claiming dower, or a jointure out of those lands.

Thus, where a man, on his marriage (*d*), entered into a bond for 600*l.* to a trustee, with a warrant of attorney to confess judgment thereon, to be defeazable on the payment of 300*l.* to his wife, if she should survive him, and the wife afterwards joined the husband in a fine of all his lands; it was resolved, that the fine not only bound the wife from claiming dower out of the lands, but destroyed her interest in the judgment. And the Lord Keeper decreed, that the wife should procure satisfaction to be acknowledged on the judgment.

And as a wife may, by levying a fine, absolutely bar herself of her dower or jointure; so

(*d*) *Goodrick v. Sherbolt*, Pre. Ch. 333, Sc. by the name of *Shotbolt v. Biscow*, Gilb. Rep. Eq. 18.

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may she thereby charge or incumber her interest
therein.

But in such case (*e*), where the husband agreed that she should have the redemption of the mortgage; in regard the wife, in confidence of this agreement, had levied the fine, and thereby barred her dower, the husband and wife being both living, the Court decreed, that after the husband's decease, the wife, in case she should happen to survive him, should enjoy her dower.

But the husband having in this case mortgaged the estate twice more (*f*), such agreement was held fraudulent against the subsequent mortgagees, so far as it entitled the wife to the whole equity of redemption. But, notwithstanding the mortgagees pressed that the decree might only be, that she should enjoy her dower notwithstanding the fine, the Court thought it unreasonable to put the wife to her writ of dower, because they might convey away the estate, and she not know against whom to bring it; and therefore decreed the dower to her.

Notwithstanding these principles, if it appears not to have been the intention of the husband

(*e*) *Dolin v. Coltmam*, 1 Vern. 294. (*f*) *Ibid.*
and

and wife, in levying a fine, to bar the wife's jointure, the fine will not affect it.

Thus where *W*, and *R* his wife (g), being seized of lands to them, and the heirs of *W*, did, by indenture, bargain and sell the same to *P* in fee, subject to a proviso, that if *W*, or his wife, or the heirs of *W*, paid 100*l.* to *P* at a given day, that then it should be lawful to them, and to the heirs of *W*, to enter, and to re-have and enjoy, as in their former estate, this indenture notwithstanding; and that then, after such a payment, this indenture, and all other fines and assurances, to be passed between the said parties, should be to the use of *W* and his heirs (leaving out here the wife); and lastly, it was agreed thereby, that all fines and assurances, to be made between the parties within seven years following, should be to the uses, intents, conditions, grants, and agreements, before therein expressed, and to no other use, intent, and purpose, &c. The deed was not enrolled. *W* and *R* his wife, within seven years, levied a fine, according to that indenture, to *P*. Afterwards *W* died. His wife at the day paid the 100*l.* and entered. Then one entered by command of the heir of *W*, pretending that by the payment of the 100*l.*

(g) *Southcoat v. Manory, Cro. Eliz.* 744.

the fine was to the use of the heirs of *W*, and not to the wife; but resolved unanimously, *per curiam*, that the wife should have an estate for life; for so was the condition, and the first part of the clause; and the other part of the clause, or middle clause, was not repugnant, but stood well with it, that it should be to the use of the husband and his heirs, and did not controul the limitation to the wife for her life; and when both clauses might, by any construction, stand, it was to be construed accordingly; and the last clause expounded this fully, *viz.* "That all assurances should be to all the uses contained in the indenture," whereof this was one; and that if all the clauses could not stand together, the first should stand rather than the last.

So, where a jointure was settled upon a woman (*h*), issuing out of some houses in *London* which were burnt down, and she joined her husband in a fine of the houses, to create a long term for raising money to rebuild them, upon an agreement that she should have her jointure out of the reserved rent thereof; it was adjudged, that the fine did not affect the jointure.

Again, where *A*, upon a marriage between him and *B* (*i*), and in consideration of 500*l.*

(*b*) Anon. *Skynner*, 238.

(*i*) *Solly v. Whitefield, Finch*, 277.

which

which she brought as her portion, settled an annuity of 50*l.* *per annum* on her during her life, issuing and to be paid out of several lands; *A* afterwards mortgaged the lands to *C*, and prevailed with *B* to join with him in a fine of part of the mortgaged premises; and, upon a bill brought by *B* to have the said annuity, settled on her as aforesaid, paid in future, and also to have the arrears thereof, it was insisted on the part of *A* and *C*, that, *by the fine*, she had extinguished her right to the annuity; but it appearing, upon reading some proofs, and producing deeds, that *C* had notice of this annuity before his mortgage, and that it was excepted in the mortgage, and that it was never intended that she should extinguish this annuity by joining in the fine, the Court decreed that the annuity should be paid in future, and all arrears thereof up to the time of the decree.

And an answer in Chancery by a *femme covert*, has been adjudged as equal to a fine, in binding her trust estate by her mortgage.

Thus (*k*), where an estate was purchased in trust for the husband and wife and their heirs,

(*k*) Anony. Moseley, 248. *Et vid.* Ellis v. Atkinson, 3 Bro. Rep. Chan. 565, and cases cited therein.

and the husband and wife joined in a mortgage to the vendor, to secure 500*l.* part of the purchase money ; the mortgagee brought a bill of foreclosure, and the husband and wife put in a joint answer ; the husband died, and a motion was made for the wife, that she might amend her answer, put in by coercion during coverture, and she insisted on the mortgage not being obligatory on her, because no fine was levied ; *sed per* Lord Chancellor, I shall not grant this motion ; for though the mortgage is insufficient at law, I shall consider it as a good mortgage, since the wife does not pretend she was any ways imposed on ; and an answer in this Court has been adjudged equal to a fine.

One question, in the case of *Palmes v. Danby* (¹), was, whether a *dowress* had a right to redeem a mortgage ? And the Lord Keeper declared his opinion to be, that she had, paying her portion of the mortgage-money, and to hold over for the rest ; and he distinguished this from Lady *Radnor*'s case, because there was a satisfied term, and the husband had a power to bar her by assigning it over ; but here it was only a mortgage, and against the heir.

(¹) *Palmes v. Danby*, Pre. Ch. 137.

So (*m*), if there be a jointress of lands mortgaged, she, paying the mortgage, shall hold over, till she and her executor shall be repaid, with interest; for, as she is entitled to hold the lands discharged from incumbrances, she ought to be reimbursed the money she pays to set her estate free, and in the condition in which it ought to have been.

And the law is the same, although the settlement be upon articles only (*n*). Therefore, where the late husband of the plaintiff entered into articles with her, whereby it was agreed, that certain of his lands should be settled before the marriage (which was then intended between them) should be ~~settled~~ upon him and her, and the heirs of his body by her. He died before the settlement made in pursuance thereof, the lands being mortgaged to one who had no notice of the articles. After his decease, the plaintiff exhibited her bill to have them executed; and, although it was objected, that the articles being to make the settlement before marriage, the plaintiff's marrying before it was done, was a waiver of the benefit of

(*m*) Bertue & Stile, cited 1 Ch. Ca. 271. *Et vid.* Palmer v. Danby, *supra*, Sc. Pre. Ch. 137.

(*n*) Haymer v. Haymer, 2 Vent. 343.

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them, and (the plaintiff being the sole party with whom they were made) a release in law; yet an execution of the articles was decreed against the heir at law of the husband, and also that the plaintiff should redeem and hold for her life, and her executors should detain the land, until the money, that she had lain out upon the redemption, was raised.

Where a mortgagee lends more money on his old security, without notice of a settlement intervening, he shall be allowed it; for, the legal estate being in him, he may protect himself thereby against a jointress, in like manner as he might against any other person, whose claim had no basis except what was founded on an equity.

Thus (*o*), where tenant in tail demised his lands for 99 years, by way of mortgage, and afterwards married, and, in consideration thereof, and of 500*l.* portion, suffered a recovery to enable him to settle a jointure, and then took up more money from the mortgagee upon the former security. The jointress was plaintiff, and the question was, whether the defendant should be allowed the money lent after the recovery

(*o*) *Goddard v. Complin*, 1 Ch. Ca. 119.

and

and marriage? And the Court declared that, if the defendant had no notice of the jointure when he lent the new money, he must be allowed it.

And a settlement of mortgaged premises, made after marriage, if *merely voluntary*, is void against a second mortgagee, although he hath *notice* thereof.

Thus (*p*), where a man who had mortgaged his estate, married, and, after marriage, made a settlement of the mortgaged estate upon his wife, which was recited to be in consideration of a portion paid, and *then* mortgaged it a second time; he dying, she brought her bill to be let into her jointure, on payment of one third of the money due on the first mortgage, without being obliged to redeem the second mortgagee, whom she charged as having had notice of the jointure. It appeared that the second mortgagee had notice of the jointure, at the time of the mortgage; that there were no articles previous to the settlement; and no money was proved to be paid after marriage. And it was decreed, at the Rolls, that she should not be let into her jointure, without re-

(*p*) *Gardiner v. Painter, Sel. Ca. Ch. 65.*

Z z 4

deeming

deeming both; which decree was affirmed on appeal to the Chancellor.

A wife, being a creditor by bond given before marriage, shall redeem her husband's estate mortgaged; and the estates being part copyhold will not alter the case. Thus (*q*), where the plaintiff's husband, before marriage, gave her a bond to leave her 1000*l.* if she survived him, and the same day married her, and some years after died intestate, leaving a freehold and copyhold estate, all in mortgage. The plaintiff took out administration, but the personal estate not being near sufficient to pay the bond, she brought her bill against the heir and mortgagee to redeem, and be let in to have satisfaction of her bond. The defendant, the heir, urged, that by the marriage, the bond became void in law, and could not be maintained in equity, especially against him, who was chargeable only, in such case, by being particularly named; and that, although it should be supported as a marriage agreement in writing, yet it could only charge the personal estate, and could not affect the copyhold. *Sed per curiam:* if the bond were executed (which, being doubtful, was ordered to be tried) the

(*q*) *Acton v. Acton*, Pre. Ch. 237. Sc. 2 Vern. 480.

Court

Court would support it as a bond, and the freehold and copyhold being mortgaged together, the plaintiff should redeem both.

A jointress of part of an estate mortgaged (*r*), is entitled to redeem the whole. But if a jointress, after marriage, joins with her husband in a fine, and mortgages the land, and then the husband dies, there her land is charged, and she shall pay her part towards disineumbering of it. And, in that case, her executors shall not hold the land until satisfied thereout; because she herself concurred in the carrying on the charge, and therefore must join in disbursing of it according to the value of her interest, which is estimated at the rate of one third of the principal; and the jointress, unless she redeem, must keep down the interest.

If a husband lends out money on mortgage in the name of himself and his wife, and then dies, the wife is entitled to the survivorship, if there are assets sufficient to pay the debts without this money; for, in this case, the wife is in the nature of a joint purchaser. Thus,

(*r*) Howard *v.* Harris, 1 Vern. 191. Sc. *supra*, Howell *v.* Price, Gilb. Ca. Eq. *et supra*. 106. 2 Ch. Ca. 99. 1 E. Ca. Abr. 316, 7.

where

where *G*'s (*s*) personal estate was decreed to be applied to the payment of debts and legacies in case of his real estate, which by his will was made liable thereto; and his widow and executrix, now the wife of the defendant *B*, upon the account before the Master, insisted, that several mortgages and bonds for money lent by her husband, being taken in the name of the husband and wife, she was entitled thereto as survivor, and that the same ought not to be brought into the account as part of the personal estate: the Master having stated that matter specially, it was insisted for the heirs, that the wife was but in nature of a trustee, the money being the husband's, which if paid in the life-time of the husband, would have fallen into his personal estate again, and he would not have been accountable to the wife; and that if this should not be liable to debts, the husband, by joining his wife in the security, might defraud all his creditors: but the Court decreed in favour of the defendant, against the heir at law.

But in the case of creditors (*t*), the husband and wife being joined in the security, would not avail *her* against them.

(*s*) Christ's Hosp. *v.* Budgin *et ux.* 2 Vern. 683.

(*t*) Gately *v.* Quarrel, cited in the last case.

It was held, in the case of *Brown v. Gibbs* (*u*), that a trust-term should not be removed out of the way of a dowress, even to let her claim in against an heir at law; and this determination was confirmed upon the first hearing of the case of *Wray v. Williams* (*x*), wherein this point came again under consideration, upon a claim set up by a dowress against the devisee of her husband, who defended himself by a trust-term, created originally to defend a purchaser. The resolutions in both these cases were founded upon the determination in Lady *Radnor's* case (*y*), which was very different in its circumstances; *that* being the case of a purchaser, for valuable consideration of an estate, whereof there was a term for 99 years standing out, created for the performance of several trusts, and afterwards to attend the inheritance; by assigning over of which, the husband had a power to bar his wife of dower; and which step he *had* taken to secure the purchaser.

(*u*) *Brown v. Gibbs*, Prec. Ch. 97. Mich. 1699.

(*x*) *Wray v. Williams*, Pre. Ch. 151. Sc. 1 Will. 137.
28 June 1700.

(*y*) Lady *Radnor's* case, Pre. Ch. 65. Mich. 1694. Sc. 1 Vernon, 356. 2 Ch. Ca. 172, and in Eq. Ca. Abr. 219. by the name of *Bodmin v. Vanderbendy*, Sc. Show. Parl. Ca. 68. *et vid.* *Hill v. Adams*, 2 Atk. 208.

But

But the injustice of these decisions in favour of the heir at law and devisee (the latter of whom was a mere volunteer) against a doweress, whose title is particularly favoured in law (especially where the contrary was held respecting a jointress, who was considered as a purchaser) could not long escape the observation of the court; more especially, as they were made expressly upon the authority of a case, the circumstances of which were totally different. Accordingly, this doctrine was revised, and the contrary determined in a series of decisions.

Thus, in the case of *Hitchin v. Hitchin* (z), where *H*, the plaintiff's grandfather, made a mortgage for 500 years (which was satisfied, and after his death, assigned to *S* his relict, who was entitled to dower of his estate) and then died, leaving the plaintiff's father his son and heir; who being indebted, made his will, and thereby devised lands to his wife *L*, but did not mention the devise to be in satisfaction of her dower, and devised the residue of his estates unto his executors until his debts paid. *L* brought her writ of dower and recovered; then the heir brought his bill to be relieved

(z) *Hitchin v. Hitchin*, Pre. Ch. 133. Mich. 1700.
Sc. 7 Vern. 403.

against

against the recovery, and she brought her bill for a discovery and to set the term out of the way; and it was decreed, that the dowress should be relieved against a satisfied mortgage term.

The case (*a*) of a satisfied or unsatisfied mortgage term, seems to differ only in this; that in the one, the Court gives the dowress relief absolutely, in the other, upon terms of keeping down a third of the interest, or paying a third of the principal: but as to the mortgagee, the dowress must pay the whole money, and hold over for the residue.

This latter resolution, as to trust terms, was farther settled, upon a bill of review brought upon the case of *Williams v. Wray* (*b*), in which Lord Keeper *Wright's* decree was reversed; and also in the case of *Hyford v. Hyford*; both of which resolutions were made by Lord Keeper *Harcourt*, and firmly established the law, that *a dowress having recovered at law,*

(*a*) *Banks v. Sutton*, 2 Will. 700.

(*b*) *Williams v. Wray*, 1 Will. 137. Hill. 1710. *Higford v. Higford*, 1 Eq. Ca. Abr. 219, 5. Easter 1710. *Sed vid.* 2 Will. 707. where this case is said to have been determined in Easter 1711.

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*a trust-term set up should not stand in her way
in equity.*

So in the case of *Dudley v. Dudley* (*c*), it was held, that a trust term, attending upon the inheritance, should be removed in favour of a doweress against an heir at law.

But a wife is not entitled to dower (*d*), out of the equity of redemption of a mortgage in fee.

This distinction (*e*) between a mortgage in fee and a mortgage for a term of years, appears to have taken its rise from the equity of redemption of the former having been considered as analogous to a *pure* trust; of which it was formerly, and is now generally understood, dower cannot be; as well because, in such case, there is no seisin by the husband, which, at law, is necessary to consummate the title of dower in the wife, as that, by the preamble to the statute of uses, it was recited, that, by means of uses, the wife was defeated of her

(*c*) *Dudley v. Dudley*, Pre. Ch. 241. Sc. 1 Eq. Ca. Abr. 219, 5. Easter 1711.

(*d*) 1 Atk. 606. 3 P. Will. 234, 5.

(*e*) *Vid. Godwin v. Winsmore*, 2 Atk. 526.

dower,

dower, from whence it appeared, that the wife of *cestui que use* was not dowable at common law; and if so, then the conclusion necessarily followed, that as an use at common law was the same as a trust since the statute, the wife could no more be endowed of a trust since the statute, than at common law, and before the statute, she could of an use. And as the analogy to uses had great weight, originally, in establishing this rule as to trust-estates, so the common practice of conveyancers, founded thereupon, of placing the legal estate in trustees on purpose to prevent dower (which made the letting in that claim upon trusts, contrary to former opinions, of dangerous consequence to old titles) rendered the courts of law very jealous of breaking in upon this rule; it having been thought safer to abide strictly by the rule of law, *even* in cases where the reason of it did not apply, *than* to shake the foundation of ancient titles, by permitting nice and curious exceptions to be made to the general rule.

Therefore, although this rule of law, as to a doweress claiming dower out of the equity of redemption of a mortgage in fee, was attempted to be broke through in the case of *Banks v. Sutton* (*f*) (in which case, this doc-

(f) *Banks v. Sutton*, 2 Will. 700. *Vid 3 P. Will. 232, B.*

trine was gone into by Sir *Joseph Jekyl*, Master of the Rolls, in a learned and elaborate argument, and it was resolved, that a woman was entitled to dower out of the equity of redemption of a mortgage in fee) yet in a later case, in which this question came before the Lords Commissioners of the great seal, that decision of Sir *Joseph Jekyl* was over-ruled, and the resolution in the case of *Banks and Sutton*, as to this point, taken as a general position, held not to be law.

The case I allude to, was that of *Dixon (g)*, widow of *Abraham Dixon*, against Sir *George Saville*, and others, which came on to be heard, upon bill and answer, the 7th November 1783. The circumstances were as follow: *Abraham Dixon*, being in his life-time and at his death, seised in fee of estates in the county of *Northumberland*, of the yearly value of 3000*l.* and upwards, died in 1782, without issue, leaving *Anne Dixon*, the plaintiff, his widow. *Abraham Dixon*, by his will, dated 3d January in the same year, devised his real estates, &c. to the defendants, Sir *George Saville*, *William Orde*, and *Thomas Adams*, their heirs and af-

(g) *Dixon, Widow, v. Sir Geo. Saville et al.* 7 Nov.
1783.

signs,

signs, upon trusts in his will mentioned, and subject thereto, to his great nephew *Arthur Onslow*, his heirs and assigns, for ever.

The testator not having, in his life-time, made any settlement or other provision for his wife, in lieu or bar of dower; she, not having done any act to bar herself thereof, filed her bill against the trustees, stating the above facts, claiming dower out of all the testator's real estate, and praying to be let into the receipt of one-third part of the rents and profits thereof.

To this bill, the trustees and infant put in their answer, setting forth, that the testator, being seised of these premises, had borrowed a large sum of money upon mortgage, and for securing the re-payment thereof with interest, had, previous to his marriage with the plaintiff, conveyed the premises unto the mortgagee *in fee*, subject to a proviso for redemption, on re-payment of the money with interest; that (the legal estate in the premises being by this mortgage absolutely vested in the mortgagee, previous to and at the time of the intermarriage of the testator with the plaintiff, and not being at any time afterwards re-conveyed to him, but remaining vested in the mortgagee at the time

of his death, and he being therefore only entitled to the equity of redemption thereof at the time of his intermarriage, and at all times thereafter, until the time of his death) the plaintiff was not at any time dowable in or out of the said premises, or any part thereof; nor was entitled to claim, either at law or in equity, any dower or thirds therein.

On the hearing, the plaintiff could have proved by witnesses, that the testator, her husband, understood and declared (*h*) that after his death his widow would be entitled to dower out of his real estates; and that he made his will under that idea, could have been proved, if relevant, by the person who drew it, Mr. *Dixon* having put the question to him, whether Mrs. *Dixon* would not be entitled to her dower, to which he, being at that time ignorant of the mortgage, answered, that she certainly would. Indeed the will itself sufficiently spoke the idea;

(*b*) Since the publication of the two first editions, I have been informed, by the gentleman who drew this will, that no such declaration could have been made, and that the question alluded to, as put by Mr. *Dixon* to the drawer of the will, was not put at the time of making, nor, in the recollection of the party, at any other time, the drawer having made it without knowing of any mortgage or other charge affecting the estate.

for

for *Dixon* thereby bequeathed to the plaintiff, by the name of his dear wife *Anne Dixon*, his coach and harness and a pair of horses, together with as much of his plate as she should think proper, not exceeding the sum of 60*l.*; which things she could have no occasion for, if she had not a jointure to support her.

If the question was lost, Mrs. *Dixon* was left totally destitute of any provision.

The claim of the widow was supported on three grounds.

First, the general law.

Secondly, the distinction between a mere trust and an equity of redemption; and,

Thirdly, the authorities in favour of dower under circumstances not more favourable than those attending this case.

Under the first of these heads, it was observed, that dower was a right of the first attention and most sacred preservation at the common law, it was a right not only founded in our law, but a right consonant to the first

principles or laws of morality and equity, as springing from the moral obligation a man was under to make a provision for his wife. And we accordingly found it, in a variety of cases, aided and extended beyond its strict *legal limits*, by the interposition of our courts of equity, in removing trust-terms, and other obstructions to it in certain cases, which would stand in the way of it at common law. This proved it to be a right not merely confined to our common law, but a right recognized, protected, and aided *in equity*; and which, so far as it was the subject of relief in equity, must be considered as an equitable right (*i*). This was the predicament in which it stood in the cases of *Dudley and Dudley*, *Hyford and Hyford*, *Wray and Williams*, and the other cases, wherein it had been decided that a dowress should have the benefit of a trust-term attendant on the inheritance, as against the heir. Considering it therefore as an *equitable right*, it well might be a wonder how it came about, that a widow should not be entitled against the heir to dower of an equitable inheritance. Some, indeed, had confined the rule of her not being so, to the cases where the trust was created by the husband himself (*k*); this was the opinion

(*i*) *Supra.*

(*k*) *Supra.*

of

of the Master of the Rolls in *Banks* and *Sutton*; however, this opinion had been over-ruled, and it seemed to be a settled point, that a widow was not dowable of a direct proper trust.

This naturally lead to the second head of argument in favour of the widow; namely, the distinction between a *mere trust*, that was an *use*, as it was styled at common law, and an *equity of redemption*; the former was regarded at common law as quite a distinct interest from the legal estate, to which the right of dower was annexed. It, of course, did not involve in it that right; if it had, there would have been two opposite rights of dower in the same lands at the same time; as the widow of both the *trustee* and of the *cestui que use* would have been entitled to dower. For the widow of the trustee was clearly entitled at common law; and when the Court of Chancery interposed to prevent the *legal* title of the widow of the trustee, it seemed extraordinary that it did not, in its place, substitute an *equitable* one of the widow of the *cestui que trust*. But, however, these sorts of trusts being the *creatures* of the parties themselves, whatever were the legal incidents or privileges they wanted, might have been supposed to have been *voluntarily* relin-

quished and abandoned by the parties creating those trusts. But it was otherwise in regard to an "*equity of redemption*," that was not any interest created or reserved, by or between the parties, beyond the express time of redemption; it was a mere creature of a court of equity itself, founded on this principle, that as a mortgage was originally nothing more than a pledge or security to the mortgagee for his money, it was but natural justice between man and man, to consider the original ownership of the lands as still residing in the mortgagor, subject only to the *legal title* of the mortgagee, *so far* as such legal title was requisite to the end of his security; and accordingly, the title of the mortgagee was not treated, by equity, as any title beyond that point. His *beneficial* interest, though the mortgage was in fee, was considered only as personal estate; he was not permitted to grant leases or exercise any other act of ownership, to the prejudice of the mortgagor, to whom he was even accountable for the profits of his estate. His widow was not permitted to claim dower, nor could he or those claiming under him avail themselves of several other privileges and incidents attending real property. It seemed to be the regular consequence of the doctrine adopted by our Courts

of Equity, in regard to mortgages, by considering them strictly and merely in the nature of *securities* for the mortgage money, and entitling the mortgagee to no other of the incidents or privileges of ownership in the lands than what was requisite for the end of such security; that all such privileges and incidents of ownership of the lands, as were not considered as becoming vested in the mortgagee for the purpose of his security, and the exercise and enjoyment whereof could not be prejudicial to, or inconsistent with that security, should be held to remain in the mortgagor, or in other words, that he should, to all purposes not prejudicial to the mortgagee, be considered as the complete owner of the mortgaged lands. And accordingly this was found to be the established doctrine in several instances, when only *volunteers* were interested, such as revocations under powers, and revocations of devises, as in the cases of *Thorn v. Thorn*, and *Hall v. Dunch* (*l*), and other like cases. That in the case of *Lincoln* and *Rolle* (Parliament Cates, 156) the doctrine was expressly recognized and admitted on both sides; because in equity a mortgage did not make the estate another's, and

(*l*) *Supra.*

3 A 4

because

because a mortgage was *not an inheritance* but a *personal estate*, and there seemed no reason in the world why these general incidents of complete ownership should be saved in favour of a devisee or other volunteer, and not in favour of a wife, whose claim of dower stood upon the strongest grounds of moral and equitable right, and who was, in many instances, considered as entitled to relief in equity, in regard to an intended provision, when a devisee or other mere volunteer was not. And, agreeable to this doctrine, was the decision in the case of *Banks and Sutton*, where it was decreed in favour of the claim of dower, out of an equity of redemption of a mortgage in fee; which decision was founded on a variety of authorities, and reasons delivered by the Master of the Rolls, all which were equally forcible in the present case. That the case of *Banks and Sutton* was directly in point of the present question; for though the Master of the Rolls would not take upon himself to determine the question, in regard to the dower out of a *mere trust*, created not by the husband, but by some other person, with no time limited for conveying the legal estate; and avoided this point, by shifting his grounds to that of the husband's being entitled, under
the

the express direction of the will under which he claimed, to have the estate conveyed to him at the age of twenty-one; which circumstance, under the application of a common principle of equity, of *considering that as done which ought to have been done*, of course in equity, let the widow in to the same degree of title as she would have had if the trustees had conveyed the estate to her husband at the time directed; yet as there was a mortgage in fee prior to the devise, the other point of the right of dower, *out of such equity of redemption*, still subsisted independent of the constructive or assumed conveyance by the trustees at the time directed. And as the principle on which the Master of the Rolls got rid of the first point did not apply to this, he accordingly found himself constrained, instead of changing his ground as before, to enter into a strict examination of it, and meet the objections to dower with authorities, inferences, and general reasoning, and through them to come to a professed decision of the point, as he expressly did when he said, "he did not know or could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress;" and as there were authorities in cases less favourable, he therefore declared, that the widow

of

of the person entitled to the equity of redemption of the mortgage in question, *which was a mortgage in fee*, had a right of redemption; and decreed her the arrears of her dower from the death of her husband, she allowing the third of the interest of the mortgage-money unsatisfied at that time: that an authority more directly in point than this was could not be expected. And though the subsequent case of the Attorney-General against *Scott* (m) (before Lord Talbot) in which the widow was denied dower, was generally considered as an authority contrary to, and superseding that of *Banks* and *Sutton*; yet such a conclusion seemed too hasty, as the two cases appeared to differ materially; for in that of the Attorney-General and *Scott*, although there was a mortgage, yet the question did not turn upon that, because the legal estate was outstanding in trustees, in whom it was vested antecedent to such mortgage, and consequently the decision in that case was on a direct proper trust, and not on a mere equity of redemption. And the difference between a *direct trust* and an *equity of redemption*, and between the claim of a widow and that of a devisee or mere volunteer, was strongly insisted

(m) Attorney-General v. Scot, Ca. temp. Talbot, 138.
upon;

upon; and the distinction between this case and that of a claim of dower against a purchaser fully enforced.

But the Lords Commissioners said (*n*), that the case of an estate by the curtesy in a trust was the anomalous case, not the rule, that the wife should not have dower: and that this point was so much settled, that it would be wrong to discuss it much; and the bill was dismissed, but without costs, *the defendants not praying them.*

However, it is necessary here to remark, that there were some circumstances which distinguished the case of *Banks* and *Sutton* from this of *Dixon* and *Saville*; particularly that, in the former case, the mortgage was made by the ancestor of the husband, whose widow claimed dower, and the estate came to him, by devise subject thereto; also, that the testator seemed to have intended, that the mortgage should be paid off out of his personal estate, and the rents and profits of the real estate, which would accrue before the devisee attained his age of twenty-one; at which time a moiety of the legal estate was positively directed to be con-

(*n*) *Vid. Gilb. Lex prætoria, 266, 267.*

veyed

veyed to him. For, although the former circumstance of the mortgage descending, does not appear to me to afford any argument of considerable weight in favour of the dowress, because, the only inference that could be drawn from that circumstance would be, that the mortgage being made by the ancestor, and not by the husband, it could not be concluded that there was any intention in the husband to make the mortgage a means of depriving the wife of dower (which was a distinction, that had been attempted to be made, in cases when the wife claimed dower of trusts between trusts descending and trusts made by the husband); but which inference could not be applied to the case of a mortgage, because, whether that descended to, or was made by, the husband, the intention with which it was made, was obviously with a view to raise money only, and could not, by any argument, be made to supply an inference, that it was done with a view to prevent dower: yet the latter circumstance might perhaps be considered as deserving more weight; for, if the trustee, who was himself the mortgagee, by misapplying the personal estate of the testator, and the rents and profits of his real estate, was himself the cause of the mortgage standing out, and made this a reason to hold back

back the conveyance of the legal estate, according to the directions of the testator, there seems as much reason for the application of the rule of equity of *considering that as done*, which *ought to be done*, in order to let in the widow in equity, to the same degree of title, *notwithstanding the mortgage*, as she would have had, if the trustee had conveyed the estate to the husband at the time directed, as there was for the application of it for that purpose, *notwithstanding a trust*.

And it is observable that, in this point of view, the cases of *Banks* and *Sutton*, and *Dixon* and *Sir George Saville*, are perfectly reconcilable, and may stand together, the former being considered as establishing the general principle of law, that the wife of one entitled to an equity of redemption of a mortgage in fee, shall not be entitled to dower out of such estate; the latter, as an exception to that general rule, as falling under another and distinct principle of equity. *Sed quære.*

And that there may be exceptions to this rule, as to trusts, is evinced by the resolution in the case of *Otway* and *Hudson* (*o*); in which

(*o*) *Otway v. Hudson*, 2 Vern. 583. N. B. This was a case of customary dower. *Vid. 2 Atk. 526. per L. Hard.*

case, tenant in tail of the trust of a copyhold estate, having desired the lord to admit him, and being refused, and having brought a bill against the trustees to have a surrender made him of the legal estate, died, *pending the suit*; and, although the husband was never feised of the legal estate of the copyhold, yet the widow was decreed her free-bench; which was a decision contrary to the rule laid down in the principal case, but founded upon an equity raised in favour of the wife; because of the great and obstinate delay of the trustee, who refused, and stood out a bill requiring him to convey.

It was formerly a doubt whether (*p*), upon a mortgage in fee, the mortgaged estate did not become liable to the dower of the wife of the mortgagee (*q*), which occasioned the introduction of long terms for years by way of mortgage, with condition to be void upon repayment of the mortgage-money; but that doubt hath been long since over-ruled in our courts of equity, and it is now clearly settled, that *an equity of redemption* is not liable to the dower of the wife of the mortgagee (*r*).

(*p*) Litt. Sec. 357.

(*q*) Black. Comm. 158.

(*r*) Hard. 466. Cro. Car. 190, 1.

CAP. XVII.

OF MORTGAGES MADE BY THE HUSBAND AND
WIFE, OR THE HUSBAND ALONE, OF THE
WIFE'S ESTATES, AND HIS INTEREST IN
MORTGAGE MONEY DUE TO HER.

AS the husband, by virtue of his marriage, obtains no other interest in his wife's estates of inheritance, than an estate of freehold, in her right, for their joint lives in case there be no issue of the marriage, and for his life, as tenant by the curtesy, if there be (a); it follows, of course, that he alone cannot make a valid mortgage thereof, to be binding upon her and her heirs, for any longer period (b). And there-

(a) Co. Litt. 351.

(b) Bryan *v.* Woolly, 4 Vin. Abr. 57. pl. 19. Drybutter *v.* Bartholomew, 2 P. Will. 127.

fore,

fore, where one, seised in fee, in right of his wife, of a share of the *New River* water, joined with her, and made a mortgage, by way of lease for 1000 years, reserving a pepper-corn rent, by deed without fine, and died ; a bill brought by the mortgagee to foreclose, was dismissed by the Master of the Rolls, saying, that a fine might be, and usually was, levied, of *New River* shares, and in this case, there ought to have been one, it being the inheritance of the wife ; and that, this having been omitted, and the lease expiring by the death of the husband, the mortgage was also thereby determined, and nothing remained to foreclose.

And where after marriage the husband made a purchase of a copyhold estate, and took the surrender to himself, and his wife, and his daughter, and their heirs ; and he afterwards, as being visible owner of the estate, took upon him to make a conditional surrender by way of mortgage to a stranger, and afterwards died (c) ; a bill was filed in Chancery against the mother and daughter to discover their title, and to set aside their estates as fraudulent against the mortgagee, who was a purchaser ; *sed non allocatur,*

(c) *Back v. Andrews*, 2 Vern. 120.

for,

for, by the Court, the husband and wife took one moiety by intireties, so that the husband could not *alien* or *dispose* of it, to bind the wife, and the other moiety was well vested in the daughter.

But, if the wife joins in a mortgage of her lands and levies a fine thereof, this will be binding upon her and her heirs, notwithstanding the coverture. For as, by such process, she may make an absolute alienation of her real estate, so may she make a conditional one thereof.

And a fine, levied by a *femme covert*, will make a mortgage of her trust, as well as of her legal estate, valid (*d*). Thus, where the defendant *P*, before her marriage, conveyed, with her intended and after husband's privity, the premises in question to trustees, in trust, to pay the rents and profits to her sole and separate use for her life, and, after her decease, in trust for such uses as she, whether sole or covert, should by her last will limit and appoint, and, for want of such appointment, then to her own right heirs for ever. Afterwards, she mortgaged

(*d*) *Penne v. Peacock et ux.* Ca. temp. Talbot 41.

part of the lands to the plaintiff for a term of five hundred years, to secure the sum of 1000*l.* and a fine was levied by husband and wife, who both declared the uses, as to the mortgaged premises, to be to the plaintiff for securing the principal and interest. On a bill exhibited, the wife, by order of Court, answered separately; insisting, as to this point, that the legal estate being in the trustees, the parties to the fine had not such an estate therein whereof a fine could be levied to bar her right. But the Lord Chancellor, as to this objection, observed, it was very well known that the operation of fines and recoveries was the same upon trusts as upon legal estates, and if so, it must inevitably follow, that an estate for life limited to the wife, remainder to her own right heirs in default of any appointment made by her last will, was disposed of by the fine; and if no such remainder had been limited by it, yet as the estate was the wife's, and moved originally from her, whatever was not conveyed would have remained in her, and consequently been barred: and his Lordship decreed the trustees to convey to the plaintiffs the mortgages.

Where

Where a husband, for a valuable consideration, covenanted that his wife should join with him in a fine, the Court of Chancery decreed the husband to perform it, for that he had undertaken it, and must lie by it if he did not perform it (*e*): because in such case it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose, and the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantee.

But if it can be made appear to be impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them) surely the Court would not decree an impossibility (*f*); especially if the husband offer to return all the money, with interest and costs, and to answer all the damages.

A covenant from the husband and wife, that he and his wife will levy a fine, will not be binding upon her in case of his death. Therefore, where one (*g*) seised in tail, for valuable

(*e*) *Barington v. Horn*, 2 Eq. Ca. Abr. 17 7. 5 Vin. Abr. 547. 15. 3 Will. 189, *et Note B.* there.

(*f*) *Ibid.*

(*g*) *Hody v. Lun.* 1 Roll. Abr. 375. Mich. 5. Car. 1 St. 1 Eq. Ca. Abr. 61. 2.

consideration bargained and sold to another int fee, covenanting that he and his wife would levy a fine for better assurance; and it was agreed, that 30*l.* part of the consideration-money, should be paid unto the wife upon the conuance thereof. A fine was accordingly acknowledged by them before a judge on the circuit in the vacation, and the 30*l.* paid her, the husband being sick in bed; and afterwards, and before the ensuing term, he died; whereupon the wife stopped passing the fine, and brought a writ of dower. It was held the bargainee had no remedy against the dowress, because it was contrary to a maxim in law, *that a femme covert should be bound without a fine.*

Yet in a short note of the case of *Baker v. Child* (*b*), it is said to have been determined, that where a *femme covert*, by agreement made with her husband, was to surrender or levy a fine, the Court would, by decree, compel her to performance thereof, although the husband died before it was done.

But Mr. *Murray* observed, in the case of *Thayer and Gould* (*i*), before the Lord Chan-

(*b*) *Baker v. Child*, 2 Vern. 61.

(*i*) 1 Eq. Ca. Abr. 62. Note *a.*

cellor,

xcellor, *Mich.* 13 *Geo. 2*, that, upon looking into the register's minutes, it appeared the Court made no decree in the last case, but that it was by consent referred to Mr. Serjeant *Rawlinson* for his arbitration.

From this reference, however, we may fairly conclude, that there were circumstances in this case which rendered the decision of it doubtful at least; as, had it been clear that the Court would have released the wife from the agreement, she certainly never would have submitted to an arbitration.

If a leasehold estate of the wife be mortgaged by the husband, the equity of redemption will belong to him, surviving her.

E R was possessed of a lease of lands of the demise of the Dean and Chapter of *Westminster* for thirty-one years (*k*), and married *H*, and then he and his wife mortgaged their interest and term of years unto *I E*, and afterwards, and before the day of payment, *E R* died, and *H* the husband paid the money at the day in redemption of the mortgage and entered, and made his second wife his executrix, and died.

(*k*) *Young v. Radford*, Hob. 3.

And the question was, whether the executrix of the husband or the representative of the first wife was entitled to the term? and the Court of King's Bench were uniformly of opinion, that it belonged to the executrix of the husband; the reason for which was, that though the lease was at first the wife's, and that the husband was possessed in her right, so as though he had purchased the fee simple, the lease had not been extinct, yet by the inter-marriage he had full power to *alien* it, and if he survived his wife, he was to enjoy it against her executors and administrators; so here, when he survived, the condition survived to him, and restored him to the lease in the state as it should have been, if it had not been aliened.

But it seems, that if she survived him, the equity of redemption would belong to her; for the mortgage seems to be no alienation, except to the extent of the money borrowed. This seems to be a necessary inference from the case put in *Rolls Abr.* 344. G. Pl. 15. If a woman possessed of a term takes a husband, and he grants the term upon a condition, that if he, his executors, or administrators, pays 10*l.* he shall re-enter, and afterwards he pays the 10*l.*: this is no disposition, but he shall be possessed in right

of his wife; for although he pays the money to redeem the term, yet *peradventure* he received the money for the mortgage.

It seems to have been formerly held, that a husband could not charge or grant away the trust of a term belonging to his wife (*l*). Thus where the wife had assigned her term in trust for herself before marriage, and then the husband, without the trustees joining, mortgaged the trust; afterwards, the husband being dead, the mortgagee exhibited his bill to have the land conveyed to him, or to be redeemed; and the Court dismissed the bill, observing that it had been the constant practice of the Court of Chancery, to set aside and frustrate all incumbrances and acts of the husband upon the trusts of the wife's term.

But the law in this respect hath since been changed (*m*); for it was determined in Sir Edward Turner's case, upon an appeal from a decree of the Court of Chancery to the House

(*l*) *Doyly v. Persall*, 2 Freem. 138. Sc. 1 Eq. Ca. Abr. 57. 1 Chan. Ca. 225. Mich. 25. Car. 2.

(*m*) Sir Edward Turner's case, 1 Vern. 7. Trin. Term. 33. Car. 2. S. L. Gilb. Rep. Eq. 102. 1 P. Will. 258. *et infra*. *Tudor and Samyne*, 2 Vern. 270. *et infra*.

of Lords, that a term being assigned in trust for a woman by a former husband, and she afterwards intermarrying with another husband, who aliened the term, the same was well passed away, and that the husband might dispose thereof; and the Lord Chancellor's decree was thereupon reversed.

And in the case of *Pitt v. Hunt*, where the wife before marriage being possessed of a long term for years (*n*), and *A*, the person who was to marry her, being indebted 400*l.* to *I S*, by agreement of *A* and *I S*, made a lease to *I S* for ten years to secure payment of the 400*l.* the lands being then valued at 80*l. per annum*. And by indenture, *sealed in presence of her husband*, assigned the residue of the term to friends in trust, to be at her disposal whether sole or covert (but no other words to exclude her husband); and she brought in money and other estate to the value of 600*l.* She married. Afterwards the creditors of the husband obtained judgment in debt against him; and, on a *fieri facias*, the sheriffs sold the residue of the term. The vendees had a decree against the trustees of the wife for the term; and the

(*n*) *Pitt v. Hunt*, 2 Chan. Ca. 73. Sc. 1 Vern. 18. 2 Freem. 78. Mich. Term. 23 Car. 2.

reason given by the Lord Chancellor was, because the Lords in parliament had reversed a decree obtained by Lady *Turner*. And the Chancellor held it not fit a decree should be one way in parliament, and in another way there; but declared it against his own opinion. And the reporter says that the husband, in this case, forsook his wife, refused reconciliation, and allowed her nothing, &c. yet decreed *ut supra*.

In the last case it appears, that Lord Chancellor *Finch* was much dissatisfied with the resolution of the Lords in Sir *Edward Turner's* case; for in *Vernon* it is said, he seemed to wonder at that resolution, and said it could not amount to an act of parliament to change the law; and that although, at first, there possibly was no great reason for those resolutions that the husband could not dispose of a trust for the wife made without his privity before marriage, yet, the law being so settled, people made provisions for their children, according to what the law was then taken to be, and now these provisions were defeated by this new resolution. And he commended the saying of Chief Baron *Walker*, *viz.* "It is no matter what the law is, so as it be known what it is."

And a covenant by the husband that he will convey a term belonging to his wife, is such a disposition thereof as will bind her in equity.

Thus where *A*, being a *femme sole* possessed of a long term of years, married with *R*, who having occasion for money, borrowed it of *C*, who was an under-lessee of his wife (*o*), and covenanted that he would grant him another lease of the premises, to commence after the expiration of the subsisting term, and to continue during the time he had any right, &c. and died before he had made such lease. Afterwards a question arose between an assignee of all *C*'s interest and *A*, who survived her husband, whether the property was changed by this covenant? On the side of the wife it was contended, that the covenant was only a bare agreement between the parties, and rested in covenant, which could only charge the executors and administrators of the covenantor, and that she claimed in neither of those capacities, but by virtue of that right which she had paramount to that of her husband; but on the other side it was insisted, that the covenant was a good disposition of this term in equity, and that it was not prayed that the

(*o*) Stead *v.* Cragh, 9 Mod. 42.

wife should be obliged to carry it into execution, but that the Court would declare it to be a good disposition of the term in equity. And so it was decreed to be, because the husband had a power to dispose of it; and the covenant was such a lien as bound the right, in whose hands soever it went.

And there seems to be no difference in this respect between the case of a term for years in trust for a woman, and a term for years in trust to raise money for the benefit of a woman created before marriage. Thus where *A* made a settlement, whereby he created a term for years in trust to raise 400*l.* a piece for his two daughters (*p*); one of them married *B*, and he and his wife brought a bill, and had a decree to have the 400*l.* raised and paid. But before it was raised, *B* assigned the benefit of this decree in trust for the payment of his debts, and made him executor and died, leaving his wife and a child unprovided. The creditors filed a bill to have the benefit of this assignment; and though it was insisted, on the behalf of the wife, that there was a difference between a term in trust to raise a sum of money for a woman,

(*p*) *Walter v. Saunders*, 1 Eq. Ca. Abr. 58. *et vid.* S.L.
Gilb. Rep. Eq. 102.

and

and a trust of the term itself for a woman; yet the Master of the Rolls held that this was a term for years, *and not a sum of money*, and therefore not to be distinguished from Sir *Edward Turner's* case. And he said he must decree it (though against his conscience), that there might be an uniformity of judgments.

So money secured to a woman on mortgage of a term for years, or raised by sale of wife's term in trustees, becomes, on payment, the husband's (q).

But it is said to have been agreed in Sir *Edward Turner's* case (r), that where a term is assigned in trust for a *femme covert* by the *privity and consent* of her husband, there, without doubt, the husband cannot intermeddle or dispose of it.

Accordingly where a *femme sole*, being possessed of a brewhouse for a term of years (s), mortgaged it, and afterwards, a day or two be-

(q) Hob. 3. March 54, 55. Parker *v.* Wyndham, Gilb. Rep. Eq. 102.

(r) 1 Vern. 7. 1 Chan. Ca. 266.

(s) Draper's case, 2 Freem. 29. *Sed vid. contra*, 1 Roll. Abr. 343. F. 5. 7.

fore

fore her marriage, with the privity of her intended husband, as appeared by his being a witness to the deed, made an assignment of her interest to trustees, in trust for herself for life, and then for her son by a former husband; and afterwards married, and her husband took an assignment from the mortgagee, and then surrendered his lease to the reversioner, and took a new lease for the same term, and died. The question was, whether the husband, in this case, had power to dispose of the interest of the wife in this term for years, it being settled with the husband's privity? And it was held *clearly per curiam*, and admitted by both parties, that if a *femme covert*, with the privity of the husband before marriage, doth convey a term for years in trust for herself, that is clearly out of the husband's power, and he can neither dispose of nor release the interest of his wife; and if the wife should join in the grant, it would not mend the case.

We may observe, that in the last case the husband was a witness to the deed; and the Lord Chancellor, in the case of *Pitt v. Hunt*, seemed to think it necessary that the husband should be a party to the deed; for his Lordship, reprobating the resolution in Sir *Edward*

Turner's

750 OF MORTGAGE OF A WIFE'S ESTATE,

Turner's case, said he thought from thenceforth it would not serve turn to have the husband's consent or privity to an assignment of a term in trust, unless he was likewise made a party to the assignment.

And in this case the Court seemed to incline to the opinion, that if a *femme* doth secretly, without the knowledge of her husband, before marriage, convey a term for years in trust for herself, that this shall be in the power of the husband, so as he may either grant or release the estate of the wife.

And in the principal case (*t*), though the estate at law was wholly in the mortgagee, and the wife conveyed nothing but an equity in trust; yet, when the mortgagee assigned over to the husband, the husband had it under the same equity as the mortgagee had, and was just in his place, and no act of the husband could bar the trustees for the wife and her children of their equity.

And it was decreed, that this new lease should be assigned over to the wife or her trustees, paying to the executor of the husband the mortgage-money.

(*t*) *Ez Viz. a Vez.* Jun. 194.

But

But if a term be assigned by the husband after marriage to trustees, in trust for the wife, this is voluntary, and fraudulent against purchasers (*u*).

And it seems that an assignment of a term, held in trust for a *femme covert* by her husband, to a purchaser for a valuable consideration, will be binding upon her and her trustee, and that such assignee is entitled to a decree for an assignment of the legal estate to him, and that without making any settlement on the wife.

Thus where *A*, the first husband of *B*, being possessed for the residue of a term of thirty-one years (*x*), conveyed it over to trustees for the separate use and benefit of his wife, and she married *C*, a second husband, who first mortgaged the term to *D*, and then sold it to *E*. A bill was filed against the wife and her trustees to compel them to assign over the legal estate, and so it was decreed; for it was said, as the husband may dispose of a term for years, where the legal estate was in his wife, so he may of the trust of a term, without the wife or the

(*u*) 1 Chan. Ca. 225. Wike's case, Lane 54, 55.

(*x*) Tudor *v.* Samyne, 2 Vern. 270. *Et vid.* Walter *v.* Saunders, 1 Eq. Ca. Abr. 58.

trustees joining. It was objected, that the husband, in this case, had made no settlement or provision for the wife; and that, if he was plaintiff, the Court would not decree the trustees to assign to him, without making some settlement on the wife; and the plaintiff, who derived under the husband, could not be in a better condition—*sed non allocatur.*

And the latter objection seems, in the case of *Pitt v Hunt* (y), to have been considered as entitled to no weight in such case, even in respect of general creditors claiming such *term*.

Although, during coverture, any alienation of the wife's estate of inheritance, either by the wife alone, or by the husband and wife, without a fine levied thereof, be void after his death; yet a wife may, by any acts done by her which amount in law to a *new grant or a re-execution*, give it a validity. Thus, where a mortgage, in the form of a lease, had been granted of a *femme covert's* estate by the husband and wife (z), and

(y) *Vid. supra*. 744, 5.

(z) *Goodright, lessee of Carter, v. Strathan, Doug.* Rep. 53. Note 17. Sc. *Cowper* 201. *et vid.* *Doe v. Weller*, 7 Durnf. 1 East Rep. 478. *Perkins* sec. 154. *Dry-butter v. Bartholomew*, 2 Will. 127. *infra* 337. *Et vid.* 1 Ch. Ca. 255. 2 Vez. 526, 527. *Archer v. Pope*, 2 Vez. 523. *Vid. Dyer* 916, Pl. 13. *Contra* as to a lease.

after

after the husband's death, the deed being in the hands of the mortgagee, the wife had directed the tenants in possession to attorn to the mortgagee, had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for a number of years; the Court of King's Bench were all of opinion, that the conveyance in this case, though in the form of a lease, was in substance a mortgage; and not being within the reason for which leases by a *femme covert* were held to be only voidable, was absolutely void on the death of the husband; but that the acts done by the widow, the deed being in the possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, was equivalent to a new grant.

If a *femme covert* join in levying a fine to secure a mortgage on her estate, which mortgage afterwards becomes forfeited; she will not only be liable to the payment of the original sum borrowed, but if part of that sum be paid off, and then a like sum taken up, that debt will also attach upon the estate.

Thus, where baron and femme, having occasion to raise 400*l.* (a), levied a fine of the wife's

(a) *Reason v. Sacheverell*, 1 Vern. 41.

land, and made a mortgage for the same; and after the mortgage was *forfeited*, the husband paid in part of the mortgage-money, and then borrowed as much money more of the mortgagee as he had paid in before: it was decreed, that the mortgagee, having the estate at law in him by the forfeiture of the mortgage, should hold the land against the heir of the wife until the whole money was paid; and that if the heir would not pay in the whole, principal, interest, and costs, he should be foreclosed.

But in another report of this case, it is said, that the first money paid off, *viz.* the 200*l.* (b), was indorsed on the mortgage-deed, and that the wife, in presence of the husband, made account of what was due on the first and second loan, both being, by agreement, lent on security of the mortgage.

But no case has yet occurred in which it has been determined, that where the husband and wife join in a mortgage of her estate, that he shall by his own indorsement charge the estate beyond the sum originally borrowed.

But if the money borrowed on mortgage of the wife's land be for her husband's use (c), his

(b) 2 Ch. Ca. 98.

(c) 1 Vez. Jun. 1867, 7.

personal estate shall be first applied in discharge thereof; for the mortgage being originally the debt of the husband, his personal estate is the primary fund to pay it; and the wife, by consenting to charge her lands with it, does not make it less the husband's debt than it was before.

Thus, where a husband, seised in right of his wife, borrowed 500*l.* to supply *his* occasions (*d*); for securing which, he and his wife levied a fine of her inheritance, and raised a term of 500 years, which was limited to the person lending the money, with remainder to the wife in fee, to be void nevertheless upon payment of the money borrowed with interest; in the deed, the husband covenanted to pay it off. Afterwards the husband made his will, by which he gave several charities out of his personal estate, and then died, without having discharged the mortgage, indebted by simple contract. The assets not being sufficient to pay the mortgage-money, and also the charities given by the will, the widow exhibited her bill to have the former dis-

(*d*) Tate *v.* Austin, 1 Will. 264. Sc. 2 Vern. 689, *et*
Pocock *v.* Lee, 2 Vern. 604. 2 Atk. 384. Amb. Rep. 150.
Astley *v.* Earl of Tankerville, 3 Bro. Rep. Chan. 545.
Baggot *v.* Oughton, 1 P. Will. 347.

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charged out of her husband's personal estate. And so it was decreed; for his personal estate would be liable to pay debts, before legacies, though left to a charity, they being still but legacies.

So where *A*, and *B* his wife, made a mortgage of the wife's estate, and the husband covenanted to pay the money, but the equity of redemption was reserved to them and their heirs; the husband died, having made his executor (*e*). And the question was, whether the mortgage-money should stand charged upon the land, or the land be exonerated out of the husband's personal estate? *Et per Curiam*, the husband *having had the money*, is in equity the debtor, and the land is to be considered but as an additional security.

If a wife joins her husband, in a fine of her jointure, in order to a mortgage or security, although there be no agreement that she shall redeem, yet she is not considered in Chancery as absolutely parting with her interest (*f*); but there results a trust for her, to have her estate again when the incumbrance is paid off, as if it

(*e*) *Pocock v. Lee*, 2 Vern. 604.

(*f*) 2 Ch. Ca. 99, 100, 162.

had

had been a mortgage on condition, and the money paid at the day.

But if there be a settlement made either before or after marriage (*g*), and then such mortgage or security, the husband will not be answerable to the wife's estate for the money borrowed.

So if the money borrowed were to pay off a debt due from the wife *dum sola*, the husband's assets would not be liable (*h*).

Nor would it make any difference in these cases (*i*), that the husband gave bond for the payment of the money and performance of covenants; for although the creditors may sue him upon such bond at law, a court of equity will relieve him, by ordering him to be paid out of the wife's estate, which is the primary fund to discharge her debts.

And it seems not necessary that it should appear upon the face of the deed by which the

(*g*) Lewis v. Nangle, Amb. 150. 2 P. Will. 664. n. 1.
Sc. *infra*.

(*b*) *Ibid.* (*i*) *Ibid.*

mortgage is created (*k*), for whose use the money was borrowed, that may be proved *aliunde*. Thus, in the case of Lord *Kinnoul v. Money*, the position is laid down, that parol evidence is admissible to prove that the debt, which the husband contracted to pay, was the debt of another, not his own; consequently that his personal estate was not to be charged in favour of the heir or wife. And Lord *Loughborough*, Chancellor, in the case of *Clinton v. Hooper*, is reported to have said, applying his observation to a case put *arguendo* by the Solicitor General, that if the money raised by a mortgage of the wife's estate were paid to the wife, without writing and with the privity of the husband, and it were made out satisfactorily to the Court that she could dispose of it as she pleased, or suppose she kept it herself, so as to be able to make a will, &c. with all the consequential rights of personal estate; he saw no reason, why the Court should not, proceeding upon the same principle, declare that the money was not the debt of the husband. It being transferred to her, and so as to be attended with all the equitable consequences of separate estate,

(*k*) *Vid. Kinnoul v. Money*, cited *per Lord Chan.* in *Clinton v. Hooper*, 1 Vez. Jun. 186. 7. Sc. 3 Bro. Rep. Ch. 201.

it never was his, so the whole obligation upon him would consist in his covenant.

But Lord *Loughborough*, Chancellor, in the case to which allusion is last made, thought that *parol* evidence of a *declaration* of the wife, who had subjected her estate by joining in a mortgage, that it was meant to be a gift to the husband, was not admissible. When it was a transaction purporting, not only by the instruments themselves, but by all the other evidence, except *parol* evidence, to be a transaction to raise money for the husband, and he therefore bound to pay; his Lordship had great doubts, whether it was possible to apply *parol* evidence, to that transaction itself to prove it different. If the evidence were, that the wife's debts were paid by it, or if any application different from paying it to him, his Lordship saw no reason against admitting her *parol* declaration to that extent. But when he said *that*, he went far beyond all the cases, which were, where the fact was proved, that the money was paid to another account, and never did come to the husband's account, because it never was received by him at all.

And where the wife had a right to be exonerated out of the assets of her husband in respect of money raised by mortgage of her estate (*l*), and received by him, she was held to have barred herself by *telling* the executor that she did not mean to claim this right, and desiring he would proceed in paying the legacies; and parol evidence was admitted of her declaration to this effect.

But it was said in the case of *Tate and Austin*, that all other debts of the husband should be preferred to the debt due to the wife (*m*).

If the wife receives satisfaction out of the personal estate of the husband (*n*), none of his creditors have a right to stand in the place of the mortgagee, as against the real estate of the wife.

Vague words, in a subsequent assignment, importing an assent from the wife, that, on redemption, the estate should be re-assigned in such manner as either the husband or wife

(*l*) *Clinton v. Hooper*, 1 Vez. Jun. 173.

(*m*) 2 Vern. 689.

(*n*) *Per Lord Hardwicke*, 1 Vez. 252.

should

should appoint, will not alter the nature of the debt, or carry the estate to the husband.

Thus, where *Theophilus Earl of Huntingdon*, and the Countess *Elizabeth* his first wife (o), mother of the plaintiff, on the 1st of *August*, 1682, joined in a mortgage of her inheritance for 4500*l.* to supply his Lordship with money to pay for the place of Captain of the Band of Pensioners, and subject to the mortgage which was for a term of years, the estate was settled to Countess *Elizabeth* for life, remainder to the plaintiff her son in tail, with a covenant in the deed by the late Earl to pay the money, and a proviso that, on payment thereof, the term should cease; and on the 5th of the same month, the Earl, by letter, thanked the Countess for having sealed the mortgage, and added, that the profits of the office should be religiously applied to pay off the incumbrances. The mortgage was several times assigned, and particularly in 1683, when the Countess joined in the assignment; and then the proviso was, that, on payment of the money by them, or either of them, the term was to be assigned, *as they, or*

(o) *Coun. Huntingdon v. Countess of Huntingdon*, 2 Vern. 437. 1 Eq. Ca. Abr. 62. Ca. 4. Viner, vol. 4. p. 69. Ca. 9. vol. 10. p. 345. Ca. 17. 1 Brown's Parl. Ca. 1.

either of them, should direct or appoint. When money came in, the Earl paid off the mortgage, and took an assignment thereof in trust for himself; afterwards the Countess died, and he married a second wife, one of the defendants, and he died, having, by will, devised his personal estate, together with the benefit of this mortgage, to a trustee in trust, for younger children, which he had by his second wife.

On a bill exhibited by his son by the first wife, claiming, as her heir, to have the mortgage assigned to him, the Lord Keeper *Wright* refused to make such decree, unless, upon the usual terms of redemption, on payment of principal, interest, and costs, discounting profits. But this was reversed upon appeal to the Lords in Parliament, and *an assignment decreed peremptorily to the plaintiff.*

Where a *femme covert*, being a jointress (*p*), created a term for years out of her estate for life, it was held, the reversion, vesting in her, would attract the redemption. Thus, where the defendant, having a jointure of 100*l. per annum* out of some houses in *London*, which

(*p*) *Brend v. Brend*, 1 Vern. 213.

were burnt down, joined with her husband in borrowing 1500*l.* to build upon the ground ; and, to secure the same, levied a fine *sur concessit* for 99 years, if she lived so long, and a deed was afterwards made between the conusee and the husband, wherein the husband covenanted to repay the mortgage-money with interest, and the equity of redemption was limited to the husband and his heirs, but the wife was no party thereto ; the husband, having expended three or four thousand pounds in building upon this ground, died ; and the question was, whether the jointress, or the heir of the husband, should redeem ? And it was decreed in favour of the former, for that the wife was no party to the deed of re-demise, by which the redemption was limited to the husband, and the wife being a jointress, and having granted a term for years only out of her estate for life, there vested a reversion in her, which naturally attracted the redemption.

But, in the last case, as reported by the name of *Brond* and *Brond*, 2 Ch. Ca. 98, it is stated, that there was an agreement, that she should not be prejudiced, but should redeem, paying the interest of the money borrowed (*q*) ; and

(*q*) *Brond v. Brond*, 2 Ch. Ca. 98.

that

that the Court resolved, that the wife, having suffered the representatives of the husband to remain in possession and pay off his debts, without exhibiting her claim for a long period of time, should not be allowed any profits received by the husband's representatives, but from the time of the bill exhibited, which was the first notice to them of such agreement.

If a woman, entitled to a mortgage, marry, and *thereupon* the husband, in consideration of her fortune, make a settlement of his own estate upon her, although there be no particular agreement for the purpose, yet he will be considered as a purchaser thereof; and if he die, she living, it will go to his executors, and will not survive to her.

Thus (*r*), where on the marriage treaty of Lord *Hereford*, with the defendant his Lady, they being both infants, an act of parliament was procured for settling a jointure in bar of dower, wherein it was provided that, if she, when of age, did not settle her lands, part of the jointure should cease, and nothing was said

(*r*) *Blois and Martin, Executors of Lord Hereford, v. Lady Hereford, 2 Vern. 501. Sc. 1 Eq. Ca. Abr. 68. 4.*

as to the personal estate; but, upon the treaty, enquiry was made what was her portion or fortune, and a particular given in of what her personal estate amounted to, wherein (*inter alia*) mention was made of a mortgage for 1300*l.* taken in Lady *Bacon's* name. Lady *Bacon* dying, made her three daughters executrices, and their husbands gave a declaration of trust that half belonged to Lady *Hare*, and half to Lord Viscount *Hereford*. A settlement was made by the defendant, after she came of age, pursuant to the marriage agreement, and then Lord *Hereford* died, having made the plaintiffs his executors. The question was, whether this money should go to the plaintiffs, or should survive to the wife as a *chose in action*? The Lord Keeper, in determining, observed, that he laid no stress upon the declaration of trust; putting that out of the case, the law of the Court would presume a promise; and, in all cases where there was a settlement equivalent, it would be intended the husband was to have the portion; the wife should not be permitted to have her fortune and jointure both, and the rather, in this case, because it was a trust, and the husband could not come at it so as to alter the property,

with-

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without the assistance of a Court of Equity;
and the defendant was condemned in costs.

But Lord *Hardwicke* observed (*s*), upon this head of equity, in his judgment in the case of *Lanoy v. Duke of Athol*, that all the cases to which this principle had been applied, were upon settlements made before marriage, and that he could not find a case so determined, where it was a voluntary settlement after marriage. And his Lordship, in that case, in which a second settlement had been made after marriage on an accession of fortune to the wife, held, that the husband was not *thereby* a purchaser of that accession of fortune; and the ground he went upon was, that there was *no* contract on the part of the wife; for *she* was *incapable* of contracting herself, neither had *she* a *father* or *guardian* to contract for her (*t*).

It seems that, in such cases, the *quantum* of benefit the wife receives by virtue of the

(*s*) 2 Atk. 444.

(*t*) *Et vid. Tomkins v. Ladbroke*, 2 Vez. 595. If the acquisition be great, and the settlement disproportionate, a court of equity will, nevertheless, require her property to be settled, *Et Burdon v. Dean*, 2 Vez. Jun. 607.

settlement

settlement is immaterial; such cases proceeding upon the ground of equality; there being a settlement made by the husband on his wife, whereby he becomes a purchaser of her fortune; and therefore, on the one hand, as she is to have the provision made by the settlement, so, on the other, he shall have her whole portion.

And it is not necessary that there should be a settlement of any estate by the husband upon his wife (*u*); if she have a provision, in case she should survive him, out of her own estate, *that* will entitle him to the remainder of her fortune, although nothing moves from him; for it is sufficient that such is the agreement of the parties; because, if he reduces it into possession during the coverture, it will be his absolutely, and he might release it. If there be no agreement, the law, which gives her the chance of survivorship, must take place, but she waives that chance by *an express agreement* of having so much at all events; and the husband's departure from that absolute right which the law gives him over the whole, either by reducing such debt into possession, or by releasing it, is of itself a sufficient consideration.

(*u*) Ca. T. Talbot, 169, 170.

But

But as the last-mentioned *cases* rest upon *its* being the express agreement of the parties (*x*), the principle will not apply where the wife is an infant at the time of such settlement, or where the settlement is made after marriage; for in such cases the wife is incapable of contracting.

But if a settlement, made before marriage, be expressly made in consideration of *part* of the wife's property *only*, *that* will destroy the presumption that it was made in contemplation of the *whole* of her fortune; and, in such case, I apprehend, what is not specifically conveyed to the husband will survive to the wife.

Thus (*y*), where on the marriage of the plaintiff's father with the defendant, who had a portion of 300*l.* in her brother's hands, secured by his bond, a farm was settled upon the defendant for her jointure, expressly in consideration of 100*l.* paid for her marriage portion; the husband afterwards dying indebted by bonds, wherein he and his heirs were bound, and actions being brought thereupon

(*x*) *Vid.* 2 Atk. 448, 449.

(*y*) *Cleland v. Cleland*, Pre. Ch. 63. Sc. 1 Eq. Ca. Abr. 70. 14.

against

against the plaintiff, as his heir, to subject the real estate descended to the payment thereof, he exhibited his bill to have the remaining 200*l.* of the portion, which was unpaid, applied in discharge of the debts. It was pretended by the defendant, that there was but 100*l.* of her portion to be paid, and that it was agreed by her husband and herself before marriage, that the remaining 200*l.* should be her's; and besides that her husband being dead, and this being a debt to her, not disposed of, it did by law belong to her. But, for the plaintiff, it was said to have been expressly agreed before the marriage, that the remaining 200*l.* of her portion should be applied to pay the husband's debts, if there was occasion. Neither of the agreements were well proved. The Master of the Rolls decreed the 200*l.* to be applied towards payment of the husband's debts; but, on appeal to the Lord Chancellor, his Lordship was of opinion, that as the case was, unless there was an agreement that the husband should have the 200*l.* it would survive to the wife, and therefore his Lordship directed an issue as to this point.

And if (z), on the marriage, there be an

(z) Meredyth *v.* Wynn, Prec. Ch. 312. Gilb. Eq. Rep. 70. 1 Eq. Ca. Abr. 70, 15.

agreement made in consideration of the wife's portion, to make a settlement upon her for a jointure, and to settle lands upon the children of the marriage, and the wife dies before the settlement can be made, yet her portion shall go to the husband or his representatives, and shall not survive to the representatives of the wife; for he, being in no default, ought not to suffer by the act of God.

But (*a*), in such case, where a wife survived her husband, who, it was alledged, had, in consideration of her fortune, which he expected to receive (and which was represented to consist of lands and money on bond, and to be of the value of 500*l.*) settled upon her jointure of 45*l. per annum*; the wife alledging *the jointure fell short of what, by the marriage agreement, it ought to have been*, and no fine having been levied, nor assignment made of the bonds, the Court dismissed a bill brought by the husband's creditors to subject her property to his debts; saying, that the widow had the title in law to the lands, and the securities remaining unaltered, and being *chooses in action*, the benefit whereof survived

(*a*) *Lifter v. Lifter*, 2 Vern. 68. Sc. 2 Freem. 102.
Eq. Ca. Abr. 68. 3.

to her, equity would not interfere to wrest them from her.

If a *femme covert* be a mortgagee, her husband, by virtue of the marriage, will be entitled to the mortgage as a *chose* in action, though there be no settlement; and, if it be reduced into possession in his life, it will go to his executors, and not survive to his wife. The case of *Parker v. Wyndham* (*b*), as to this point, was attended with circumstances peculiarly striking. It was thus: Mrs. *Anne Ashe*, being entitled to the sum of 5500*l.* secured to her by a mortgage for years taken in the name of trustees, and likewise to 3000*l.* secured in the same manner, taken in her own name, and to other personal property, became a lunatic; and, on a commission of lunacy issued out for that purpose, the custody of her person and estate was committed to one of the defendants. Some time after, *Philip Parker*, the plaintiff's brother, by some contrivance, got at the lunatic and married her, without making any settlement or provision for her.

(*b*) *Parker v. Wyndham*, Pre. Chan. 412. Gilb. Rep. Eq. 98. 102. And this case was approved by Lord Hardwicke, in the case of *Garforth v. Bradley*, 2 Vez. 676. *Et* see three observations on this subject.

Parker and others were afterwards committed by the Court to the Fleet, and it was ordered, at the same time, that all the deeds and securities relating to the lunatic's fortune, and also her jewels, &c. should be brought and lodged with one of the Masters of the Court, in order to secure some provision for the wife in case she should survive her husband, and likewise for the children of that marriage, in case there should be any. Some time afterwards, on Mr. *Parker's* application to the Court, by petition, to have the commission of lunacy superseded, it was so directed; but, in regard Mr. *Parker's* estate was much encumbered, and he had made no settlement on his wife, it was, at the same time, ordered that so much of the 5500*l.* as was necessary, should be applied towards disencumbering his estate, and the residue laid out in a purchase of lands, which, together with so much of Mr. *Parker's* estate as would make up 500*l.* *per annum*, was to be settled in strict settlement, and the rest of his lady's fortune was to be paid and delivered to him. Mr. *Parker* never complied with any part of this order, but, being indebted to one *Goodinge* in a considerable sum of money, *Goodinge* brought his action against him, recovered judgment, and took out a *fa.*

fa. and thereupon the mortgage of 3000*l.* was sold by the sheriff; and the debt paid. After this, Mr. *Parker*, being indebted to the plaintiffs, his sisters, in about 2000*l.* each, given them for their portions, did, by indenture taking notice thereof, assign the 5500*l.* mortgage, and all securities taken for the same, and also all other the fortune and portion belonging to him in right of his wife, to trustees, in trust, in the first place, to pay thereout to the plaintiffs their portions, and then, in trust for himself, his executors and administrators. Some time afterwards the 5500*l.* was paid in, and Mr. *Parker* not having complied with the terms of the last order, that sum was again placed out at interest on a security taken in the name of a junior Master of the Court; subsequent to which, Mr. *Parker* died intestate and without issue, and in about two years Mrs. *Parker* died likewise intestate and without issue. Whereupon the plaintiffs, who were sisters and heirs at law to Mr. *Parker*, and also creditors as above-mentioned, took out letters of administration to Mrs. *Parker*, the wife, and brought a cross bill to have the fortune and securities delivered over to them.

And the Court resolved (*c*), that as to the marriage, it was then out of the case, and that the order of the 19th of *March* was likewise to be laid aside; for as the husband, if he had complied with the terms of that order, would have been a purchaser of his wife's fortune, so he, not having complied with it, it was just as if no such order had been made; that the wife being now dead, and no children left, the reason for this Court's interposing was at an end, and then, as to the 550*l.* that being paid in during the coverture, was the husband's money, and the property absolutely vested in him by law. That although the Court had thought fit to lay their hands on it, and had power so to do, it having been paid into the Master's hands, yet that was only in the nature of a caution till the husband should make some provision for his wife, which being then unnecessary, equity would follow the law and give it to the husband's representatives, to whom it belonged. As to the three thousand pounds, that being sold by the sheriff on a *fi. fa.* before the husband's assignment, the sale must take place against the assignment,

(*c*) *Et vid.* Cleland *v.* Cleland, Blois & Martin, *v.* Lady Hereford. *Supra.*

though

though perhaps the plaintiff might have an equity to the remainder, after payment of *Goodinge's* debt; for the husband might assign over a term on mortgage for years, which he had in right of his wife, and so he might likewise the trust of such term, and it would prevail against the wife although she survived (*d*).

If the wife die possessed of a mortgage, and the husband survive, it will vest in the husband, by virtue of the statute of distributions (*e*), for the *proviso* therein, saying, "that the statute shall not extend to the estates of *femme covert*s that die intestate, but that their husbands may have administration of their personal estates, as before the making of the act," was made in favour of the husband, and not to his prejudice; so that it was intended by parliament, that the husband should be within the statute of distribution, so as to take the wife's *chooses* in action as to his benefit, but should not be within the same, as to his prejudice; and this is upon good reason; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute.

(*d*) *Bosvil v. Branden*, 1 Will. 458. *Infra*. 778.

(*e*) *Vid. 1 P. Will. 382. 29 Car. 2.*

The husband must actually reduce a mortgage to which he is entitled in right of his wife into possession, by procuring payment thereof; or an alienation of it by him will not be binding upon her after his death, *unless it be made for a valuable consideration*; for if it be otherwise, and he die, she surviving, such mortgage will go to her as a *chose in action*, and not to his executor.

Thus where the plaintiff's testator having married the sister of the defendant (*f*), whose portion was secured to her by a *mortgage in fee* of part of the defendant's estate, after marriage made an assignment of his interest in the mortgage; and, by articles between him and several trustees therein named, the money was to be called in and invested in land, to be settled to the use of the husband and wife and their issue, remainder to the right heirs of the husband. The husband and wife being both dead without issue, the plaintiff claimed the benefit of the mortgage by virtue of the articles, as entitled under the husband. But the Court dismissed the bill, because the mortgage being but in the nature of a *chose in action*, the husband had not

(*f*) Burnet Arm. v. Kinnaston, 2 Vern. 401. et *vid.* S. L. Pre. Ch. 118. 3 P. Will. 200.

an absolute power over it, but only a right to reduce it into possession, which not having done, his assignee stood but in the place of the husband, and could have no greater right or power than the husband himself had, and that was only to reduce it into possession in his life-time, and he having neglected so to do, it survived to the wife, notwithstanding the articles, and must go to her administrator.

But it seems reasonable to presume (*g*), that if the husband brings an ejectment, and gets into possession of an estate mortgaged, a voluntary assignment of the mortgage by the husband would alter the property; for that case appears to be in a great degree analogous to the case of an extent on the wife's judgment, which clearly is such a possession of the debt, as vests it in the husband to dispose of at his will and pleasure.

Although a mortgage, to which the husband is entitled in right of his wife, will survive to her in case of his death as against his executors or assignees to his use; yet if his creditors get possession thereof, and thereby oblige her to apply to a court of equity for aid, the court will

(*g*) *Vid.* 3 P. Will. 200.

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not interpose its authority to take the benefit
from them.

Thus where a *femme sole* (*h*), mortgagee in fee for 800*l.* had married a tradesman who became a bankrupt, on a commission of bankruptcy being taken out against him, the commissioners had assigned over all his estate, real and personal, which included this mortgage. Afterwards, the husband being dead, and the writings relating to the mortgage being in the assignee's hands, a bill was brought by the widow of the bankrupt against the assignees for them, and to have the benefit of the mortgage. But it was held by his Honor, the Master of the Rolls, that the widow being plaintiff against the assignees, so that she, and not they, sought aid in equity, and there being in the mortgage-deed a covenant to pay the mortgage-money to the wife, this debt or *chose* in action was well assigned by the commissioners to the assignees, and vested in them; and if the right to the debt was vested in the assignees, as plainly it was, the legal estate of the inheritance of the lands in mortgage continuing in the wife was not material, it being no more than a trust for the assignees. For the trust of the mortgage

(*b*) *Bosvil v. Branden*, 1 P. Will. 458. *Supra*. 356. *Et. vid.* *Lord Carteret v. Pascal*, 3 Will. 197.

must

must follow the property of the debt, else the mortgagor would be in a very hard case, namely, liable to be sued by the assignees of the commissioners upon the covenant, and also in an ejectment by the wife of the mortgagee, whereas the latter suit would be enjoined in equity.

But if there had been any articles before the marriage (*i*), purporting that this mortgage-money should have continued in the wife as her provision, or should have been assigned in trust for her, they would have been a specific lien thereupon, and have preserved it from the bankruptcy.

In the last case, the Master of the Rolls observed, that it might have been a matter of different consideration, if the assignees had been plaintiffs in equity, and desired the aid thereof to strip the widow of all that she had, towards the doing of which, equity would hardly have lent any assistance; because the assignees, claiming under the bankrupt husband, could be in no better plight than the husband would have been; and if the husband had in equity sued for the money (*j*), or else prayed that the mortgagor

(*i*) 1 P. Will. 459. *Bennet v. Davis*, 2 P. Will. 316.

(*j*) *Vide Jacobson, et al. v. Williams*, 1 P. Will. 382. *Gilb. Eq. Rep.* 140. *Vid. Moor v. Mycault. Pre. Ch.* 22.

might

might be foreclosed, equity, probably, would not have compelled the mortgagor to pay the money to the husband, without his making some provision for his wife; or at least the wife, by an application to the Court against the husband and the mortgagor, might have prevented the payment of the money to the husband, unless some provision had been made for her.

But even in that case, I should apprehend (*k*), that if the husband was living, the assignees of the bankrupt would be allowed the interest of the mortgage during his life, because to that *he* would have been entitled.

It appears from the surprise and disapprobation expressed by Lord Chancellor *Finch* (*l*), in the case of *Pitt v. Hunt*, at the resolution of the House of Lords, in Sir *Edward Turner's* case, that previous to that determination, it had been held as clear and settled law, "that the husband could not dispose of property held in trust for his wife, existing without *his privity*, and not created fraudulently, before marriage." And it seems still doubtful, at least, to what extent the

(*k*) *Vide Jacobson, et al. v. Williams*, 1 P. Will. 382.
Gilb. Eq. Rep. 140. *Vid. Moor v. Mycault*, Pre. Ch. 22.

(*l*) *Vid. 1 Vern. 18. supra. 745.*

affign-

assignment of the husband of the wife's equitable interest, except in a case of the trust of a term for years of land, is binding upon her.

It is the constant practice of the Court of Chancery to oblige a husband, who comes into equity for his wife's *personal* property (*m*), or any thing he claims in her right, *jure mariti*, to make a settlement upon his wife by way of jointure, or to secure a maintenance for her in case she outlives him, and the Court will not interfere till that be done, not even where she is a party to the suit. And it will make no difference, though there be other provisions for the wife's separate use before marriage, yet if a great accession afterwards comes, the Court will not suffer the husband to exhaust it (*n*).

And a court of equity, where it was in proof that a husband had ill treated his wife, decreed the interest of money, part of her portion, to be paid her for her separate maintenance (*o*).

And it has been settled by a variety of cases, that where property of the wife is in the hands

(*m*) Nels. Chan. Rep. 377. Skinn. 288. *2 Vern.* 494.
Lupton and Tempest, *2 Vern.* 626. *2 Vez.* 562.

(*n*) Per Lord Hardw. *2 Vez.* 595. Burdon *v.* Dean, *2 Vez.* Jun. 607.

(*o*) Lady Oxenden *v.* Sir James Oxenden, *2 Vern.* 493.
of

of trustees or in a court of equity, and cannot be attained but in equity, assignees at law, or assignees of the husband's general property, have not a better interest than he has (*p*); and therefore such court will not extend its arm to give such general assignees any part of the wife's property which they cannot come at without the intervention of the court, unless they offer a consideration by way of allowance out of it for her. Such court considering property the husband takes in right of his wife, as in itself a provision for the maintenance of both by a title that gives him and her a joint enjoyment.

Upon this ground a court of equity refuses its aid to assignees of a bankrupt, to enable them to procure trust money, which they cannot come at, but by application to such court to act against the trustees, unless they offer to make a reasonable and proper provision thereout for her (*q*).

(*p*) *Vid. Hall v. Montgomery*, 4 Bro. Rep. Chan. 339.
2 Vez. Jun. 191.

(*q*) *Bosville v. Brandon*, 1 P. Will. 458. *Ex parte Coyselgame*, 1 Atk. 192. *Grey v. Kentish*, 1 Atk. 180. *Jacobsen v. Williams*, 1 P. Will. 383. *Worral v. Marlar*, 1 P. Will. 4th Edit. 459. (n. 1.) *Ofswell v. Probert*, 2 Vez. Jun. 680. *Burdon v. Dean*. 2 Vez. Jun. 607. *Freeman v. Parsley*, 3 Vez. Jun. 421. *Pringle v. Hodgson*, *ibid.* 618.

Thus,

Thus, where *A* married *B*, who became a bankrupt (*r*), and at the time of his last examination, he delivered up, with the rest of his estate, a bond which was given to *A*, *in trust* to secure the payment of an annuity of 40*l.* a year to *A*, during the joint lives of herself and another person. She brought a portion of 500*l.* to the bankrupt, and had nothing to subsist on but this annuity, and prayed by her petition, that the assignees might deliver the bond to her trustee, and that the arrears of the annuity and all future payments might be paid to her. And the Lord Chancellor ordered accordingly, considering the creditors as standing in the place of the husband, and not entitled any more than he would have been, in case he was no bankrupt, to the annuity without making a provision for her.

In this case, Lord *Hardwicke* seems to have considered this annuity as no more than a fair provision out of the wife's portion.

And the same principle applies to trustees of the property of a person whose wife is entitled to personal property, so predicated, under a general assignment.

(*r*) *Ex parte Coysegome*, 1 Atk. 227. 1 Co. Bank. Laws, 323.

Thus

Thus where a sum of money was devised in trust to be placed out at interest (*s*), and the interest to be paid after the death of the testator's niece *S T*, without leaving children to the defendant *C M*, during her life, and after her decease the principal to go to her children. *S T* died in the life of the testator, without children. The husband of *C M* being indebted to several persons, made a general assignment to the plaintiffs as trustees of his stock in trade, debts, and other effects whatsoever in trust for themselves and the rest of the creditors. Afterwards the plaintiffs filed their bill against the original trustees of the money and against *C M*, and her husband praying to be paid the interest and dividends on these trust monies, until they should have been paid their full demands. The question was, whether the plaintiffs were entitled to these dividends without making a provision for *C M* for life. *Et per*, his Honor, the Master of the Rolls. This is a general assignment by *WM* of all his effects to the plaintiffs in trust for his creditors. And it comes to this, whether the assignees are entitled to the interest of the funds for the life of the wife. The assignment, in this case, being equivalent to an assignment in law by bankruptcy, I cannot see why the court

(*s*) *Pryor v. Hill*, 4 Bro. Rep. Chan. 139.

should

should not admit the same equity of calling on the assignees, to make a provision for her. The assignees are not entitled to the annuity without making such provision. If the parties cannot agree, I can only say, I cannot assist the assignees to get it without their making a provision.

So an assignment of *all* the wife's property to a creditor of the husband, would not be aided in equity, unless some provision were thereout made for her.

This point occurred in the case of *Jewson* and *Moulson* (*t*). There *V* married a lady, entitled under her father's will to one fifth part of his whole estate, consisting of two freehold houses, &c. which was directed to be turned into money, but made no provision for her by way of settlement. Soon afterwards, *V* made an assignment of all the share, which in the right of his wife he was entitled to in her father's personal estate, to a bond creditor, and at a subsequent period made a second assignment of his wife's share to trustees, for the benefit of all his creditors in general. During this period, the wife was under age, and the executors did no act to settle, or make any division of the father's per-

(*t*) *Jewson v. Moulson*, 2 Atk. 418.

nal estate. The question was, whether the wife, who was totally unprovided for, should not have a maintenance secured to her out of her share of her father's personal estate, before it was applied in payment of the bond creditor, and the rest of the creditors of the husband? and Lord *Hardwicke* said, as to the last of these assignments, it did not differ from the case of assignments of bankrupts; for it was in the case of a failing man, and fell exactly under the same reasoning of an assignment of a bankrupt's effects for his creditors in general; because here he assigned all his right, title, &c. and consequently, it was exactly upon the same footing.

As to the first assignment to the bond creditor (*u*), to be sure, that was different from the other, and likewise differed in several circumstances from all the cases decided.

In the first place, here was a mixed fund (*x*), arising out of real as well as personal estate; for though the father indeed, by his will, directed the estate to be sold and turned into money, yet all the children together, when they came of age, might have said to the trustees of the will, let us take the real estate as it is, not-

(*u*) *Jewson v. Moulson*, 2 Atk. 418.

(*x*) *Ibid.*
with-

withstanding the testator directed it to be sold. Besides, the wife was an infant when she married, and likewise during all these transactions; and, consequently, a particular object of the care of that Court.

Besides too (*y*), this was not an assignment of a term for years, or a specific thing, but an assignment at once of all her fortune, and which the husband could not reduce into possession, without the assistance of the Court of Chancery, neither had there been any division made, or even an account taken of the testator's estate, which could bind the parties.

The trustees themselves (*z*), though willing to have joined with the husband, could not have bound the wife, as she was an infant, and as there was likewise a clause of survivorship in the will; and therefore there was no possibility of coming at the fortune, without the aid of Chancery; for that reason, the bond creditor must be presumed to have known all the circumstances of this security, and what the rule of equity was, in regard to provisions to be made for a wife out of her fortune.

(*y*) *Jewson v. Moulson*, 2 Atk. 418.

(*z*) *Ibid.*

In the present case (a), his Lordship laid a very great weight upon its being an assignment of the whole portion, and said if he should allow this practice to prevail, it would trip up all the care and caution of the Court with regard to infants; for a husband then would have nothing to do, but to take up money of a third person, and though neither he nor the lender knew exactly at the time what the fortune was, yet he might assign it over, and so defeat the care of the Court entirely.

Upon the above grounds (*b*), amongst others, his Lordship was of opinion, not to allow the creditor to receive the whole fortune of the wife, without making some provision for her. And he recommended, that the parties should come into terms, to which they acceded.

I have stated the most material parts of the argument of the Court upon this occasion, as it seems to have acted upon all the circumstances of the case combined together; but it is observable, that the last ground was that upon which the Court principally relied, namely, the unliquidated state of the fund.

(*a*) *Jewson v. Moulson, 2 Atk. 418.*

(*b*) *Ibid.*

An

An opinion has prevailed, that there is a distinction between general and particular assignees of the husband of personal property of the wife in trustees hands, in respect of the *equity* of the wife therein; and it has been said, that in the latter case, the wife has no equity to claim a provision against the particular assignee of the husband, out of the trust fund. This opinion seems favoured, by the sentiments thrown out on the subject, by Lord *Hardwicke*, in the case of *Grey and Kentish*. In that case (*c*) *A* devised the moiety that he was entitled to, of *W*'s estate, to *E C* for her life, and then to *E K* for life, and after her death to such of her children as should be living at her decease. This was afterwards, by a decree of the Court of Chancery, directed to be laid out in South Sea annuities, and to be paid *as directed in the will* (*d*). The husband of one of the children of *E K* assigned this legacy to *B*, for securing 150*l.* upon a contingency mentioned in the deed of assignment, which also recited the decree. The husband afterwards became a bankrupt, and

(*c*) 1 Atk. Rep. 280. *vid.* 1 Cox's, P. Will. 459, in note, the mistake in Atkyns, in stating the facts corrected.

(*d*) This was a future and contingent interest; husband died before contingency, and wife survived and let in.

the contingency, on which his wife was to take, *not having happened* at the time of the bankruptcy, *B waived his assignment*, and chose to come in as a general creditor, and assigned over the legacy to the *assignees*, under the commission of bankruptcy against the husband. The petitioner (the daughter of *E. K.* who was then dead) prayed the South Sea annuities might be transferred to her, she being entitled thereto, under the will. *Et per curiam.* A husband cannot assign *at law* a possibility of the wife, nor a possibility of his own; but this Court will, notwithstanding, support such an assignment for a *valuable consideration*, though I do not know *any case* where a person claiming, *under a particular assignee*, has been *obliged* to make *such a provision* as is prayed here. As between the *assignees* under a commission of bankruptcy, and the wife of the bankrupt, the Court has interposed and obliged the *assignees* to make a provision. What makes this case particular is, that there was a decree which ordered the money to be paid to the usher of the Court, and it was also in another respect particular, that this was not an absolute assignment, but in the nature of a security only, and was now *come back* into the hands of the *assignees* of the husband. What then was the equity arising
to

to the wife under the decree? it will neither let the husband, if he remained *sui juris*; or, if he becomes a bankrupt, his assignees touch the money, unless they first make a provision for the wife. I will put this case; suppose the husband living, and no bankrupt, and he had paid off the 150*l.* and had died, would the representative of the husband have been entitled? I am of opinion not, as it was in the nature of a pledge, but it would have been the wife's by survivorship, or, if the husband had died without redeeming the estate of his wife, she would have been entitled to have had this estate disincumbered, and the estate would have survived to her. *The particular assignee, having taken with notice of the equity of the wife, and the assignees under the commission taking it, subject to the same equity with the particular assignee, is subject to the same equity with the particular assignee.* I am of opinion it is her property, and therefore I shall direct the South Sea annuities to be transferred to her.

And the cases of *Tudor* and *Samine* (e) before-mentioned, and *Povey* and *Amhurst*, are cited in support of this distinction.

(e) *Supra.*

3 E 4

The

The facts, in the latter case, were as follow:

A had, by his will (*f*), given 1000*l.* to *B* whilst sole, afterwards, on her marriage with *C*, it was agreed, that 700*l.* of this legacy should be applied towards payment of his debts. After the marriage, *C*, without his wife, assigned the remaining 300*l.* to the plaintiffs, who were creditors likewise, and they brought this bill against *C* and his wife, and the executors of *A*, to have a satisfaction of their debts out of the remaining 300*l.* and it was decreed, that an account should be taken, and, upon the plaintiffs proving themselves real creditors, and that the assignment was *bona fide*, they were to have a satisfaction accordingly, and the residue, if any, of the 300*l.* was to be put out for the benefit of the wife.

And Lord *Thurlow*, in the case *Worral v. Marlar*, and *Bushnan v. Pell* (*g*), seems to favour this distinction, for he said that he had considered the several cases upon the subject, and did not find it anywhere decided; that if the husband made an *actual* assignment by con-

(*f*) *Povey v. Brown and Amhurst*, Pre. Chan. 325, S. C. Gilb. Rep. Eq. 80.

(*g*) *Vid.* ¶ Cox's, P. Will. 459, note 1.

tract,

tract, for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned; but that a Court of Equity had much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for, as to the latter, his Lordship's opinion was, that when the equitable interest of the wife was transferred to the creditor of the husband, by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity in respect of the wife.

But it may be observed, in answer to these cases, that in *Grey* and *Kentish* the question arose on a future and contingent interest, which, by the death of the husband, before the contingencies, survived to the wife; the case of *Tudor* and *Samine* being an assignment of a term for years, was governed by the resolution in Sir *Edward Turner's* case; and the case of *Povey* and *Amhurst* (h) was probably determined upon the ground, that a legacy was then considered as a *chose* in action, and so recoverable at law by the husband; but it has been of late decided, that this was an erroneous opinion;

(b) *Vid. 2 Atk. 180.*

that

that courts of law have no jurisdiction over this subject; and that an action for a legacy cannot be supported; and the Master of the Rolls, in the case of *Like v. Beresford* (i), denied the authority of this case on that ground.

And although there is no case in print, in which the first point, to which allusion was made by Lord *Thurlow*, in the before-mentioned cases, has been decided, yet I have great reason to think that this question was determined by Lord Keeper *Henley*, in the case of the *Earl of Salisbury and Newton, et al.* (k) which came before the Court, the 2d of July, 1759. It appears, from the Register's minutes, that the end of the bill filed in this case (l), was to have the 5th part of the personal estate, and of the money arising by sale of the real estate of *John Blewit*, deceased, to which *William Durham*, the husband of the defendant *Ann*, was entitled, in right of his wife, applied towards satisfaction of the plaintiff's debt of 1594*l.* 15*s.* 11*d.* and interest, and if not sufficient to satisfy the same, to have the

(i) 3 Vez. Jun. 512.

(k) *Earl of Salisbury v. Newton.*

(l) *Et vid. Wenman v. Mason*, Trin. Vac. 1765, stated
Cox, P. Will. 5 Edit. 459, in note.

real estate of *William Durham* sold. *Et per curiam*, let it be referred to the Master to inquire what fortune the defendant, *Catharine Durham*, the widow, is entitled to, either by virtue of the will of *James Blewit*, her father, or under the articles made antecedent, upon, or after his marriage, and to make her election before the Master, whether she is to take under the will of her father, or under the articles. Let the Master see whether *W. Durham*, deceased, the husband of the said defendant, *Catharine Durham*, hath made any settlement or provision for her or her children; and if not, let the master consider what will be a proper provision to be made, by or out of her fortune, upon her and her children, and the Master is to state the same, with his opinion thereon, to the Court; and thereupon such further order shall be made, relating thereto, as shall be just; and the reference proceeds and gives a variety of other directions. But though, from the nature of these directions, no doubt can be had but that this case must have come on again for further directions, yet, upon an inspection of the register's book, nothing further is to be found of this cause.

But among several manuscript cases collected

by the late Mr. *Fearne* on this subject, and which induced me to inquire after this case, I find the case and judgment thereon stated as follows :

Salisbury. Trinity Term 1759. "A married woman being entitled to a certain sum of money in the hands of trustees or executors, the husband having made no provision for his wife and children, and being in debt to the Earl of *Salisbury*, assigns over this money to a trustee of the Earl in trust for the Earl. The husband after dies, without making a provision for his wife and children, and the trustees refuse to pay this money to the Earl, and for which a bill was brought. But the Keeper refused to give him any relief, as no settlement was made by the husband on his wife and children, and the Earl could be in no better case than the husband, who, if he had applied to the Court for this money, the Court would have put terms on him."

And in the case of *Pope v. Craikaw* (m), his Honor said, he hoped it would be understood that a husband could not, by assigning his wife's

(m) 4 Bro. Rep. Chan. 326.

property,

property, bar her of any equity she might have in it: that he should never subscribe to the contrary doctrine.

And in a late case of *Macaulay and Philips*, his Honor, the Master of the Rolls (*n*), observing upon this question, said, that “many cases had been before him, which had put him upon the necessity of considering very much the right of the wife; and he was clearly of opinion, the doubt respecting the assignment of the husband, for valuable consideration, of the wife's equitable interest, was not well founded (*o*), with the single exception, perhaps, of a trust of a term for years of land, upon which, perhaps, there might be some doubt: but subject to that he was clearly of opinion, an assignment for valuable consideration would not bar the equity of the wife.”

A promise by a husband to assign his wife's mortgage as a security for a debt, accompanied with a lodgment of the deeds, although no assignment thereof be actually made, will be such a disposition of it in equity as will be good against the wife *pro tanto*.

(*n*) 4 Vez. Jun. 19.

(*o*) *Vid. Supra.*

Thus,

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Thus, where *D*'s wife, one of three sisters entitled to their brother's personal estate, who died intestate, and administration was granted to two other persons, with the three sisters and their husbands (*p*) ; one of the administrators came to an agreement to divide the personal estate into thirds, a third to be allotted to each ; a memorandum under the account was signed by all ; two mortgages, one in fee and the other for a term, each for 150*l.* were allotted to *D*'s wife ; the legal interest was not assigned, but by the memorandum was agreed so to be. Before any assignment, *D* borrowed 200*l.* of the plaintiff on note, and by agreement under note took notice that he had, the better to secure the 200*l.* left two mortgages with him, which he was entitled to, and promised forthwith to assign. Before any thing done, *D* died ; the plaintiff's bill was brought against the wife of *D*, *D*'s administrator, and the mortgagors, to be paid his 200*l.* and interest, or to foreclose the mortgagors. It was argued on behalf of the wife, that the mortgages were her *chooses* in action ; and, not having been assigned by her husband, survived to her, or, at least, that she was entitled to them on paying the plaintiff's debt. The admini-

(*p*) *Bates v. Dandy*, 2 Atk. 207.

istrator

strator of the husband insisted, that in equity what *D* had done amounted to an assignment, and that he was entitled to redeem the plaintiff. But it was adjudged, that the agreement amongst the three sisters, and the separating the mortgages from other parts of the estate, was an appropriation of them to *D* and his wife, and that *D*'s heir and administrator were trustees for *D* and his wife in the two mortgages: that *D* being entitled in right of his wife to the trust of these mortgages, had a power to assign them for his own use: that leaving them with the plaintiff, and giving his note, promising he would procure them to be assigned, amounted in equity to a disposition of them for so much as to satisfy the debt to the plaintiff, but not for more. For though *he might* have disposed of the whole in the manner he did, *his intention* was only to secure the plaintiff's debt, which being done, the mortgages belonged to the widow as her *chooses* in action, and not to the husband's administrator: that although one of the mortgages was in fee, it made no difference; for a husband might dispose of the wife's mortgage in fee, as well as of her mortgage for a term.

And in these cases of assignments of *chooses* in action, no particular forms are necessary to
be

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be followed (*q*) ; for the principle which governs them is, that the transaction amounts to an agreement for a valuable consideration beforehand, to lend money upon the faith of being satisfied out of the fund ; and to give effect to it, courts of equity, wherein the assignment of a *chose* in action is admitted, consider it as amounting to an assignment of so much of the debt, to effect which any words or acts evincing the intent of the parties will do, and no particular words or acts are necessary thereto. Thus if a mortgagee were to receive the money due on a mortgage, and there was wrote on the back of it, "whereas I have received the principal and interest from such an one; do you, the mortgagor, pay the money to him;" this would amount to a valid assignment in equity, and the mortgagor could not pay the money to the mortgagee without making himself liable to the assignee, because he would have paid it with full notice of the assignment for valuable consideration.

Where a tradesman having, after marriage, purchased a term for years to himself and his wife, and the survivor, and the executors, administrators and assigns of such survivor, for the

(*q*) *Watts v. Thomas*, 2 P. Will. 364.

residue

residue of the term, mortgaged it without the wife's joining, with a proviso, that if the husband or wife, or either of them, or their or either of their executors or administrators, should pay the mortgage-money and interest at the day, then the mortgage should be void; and that until default of payment, the husband, his executors and administrators, should quietly enjoy. Seven years after he died in debt, leaving his wife executrix, and the money unpaid. The question was, whether the equity of redemption of this term was assets for the payment of the husband's debts, or it should go to the wife as survivor? And it was held by the Master of the Rolls, that the settlement on the wife, being made after marriage, was a voluntary conveyance; that being only a term for years, and consequently always in the power of the husband to forfeit or alienate, the mortgage was an alienation. For, though if the mortgage-money had been paid before the day, the mortgage would have been void, and consequently all things would have been *in statu quo*; yet the mortgage being forfeited, the equity of redemption was now become a creature of equity, and it being in the case of creditors, and the redemption given, as well to the executors of

the husband as to the executors of the wife, and the last proviso being, that the husband, his executors, &c. might enjoy till default of payment, he decreed that the equity of redemption of this term should be assets.

CAP.

CAP. XVIII.

OUT OF WHAT FUND MORTGAGES ARE TO
BE REDEEMED.

THE question, out of what fund mortgages are to be paid, must be decided by ascertaining the precise nature of a debt on mortgage, which will necessarily lead to the development of the fund on which it is chargeable.

From the cases to be met with in the books upon this subject, as they relate to mortgages in particular, a man would be induced to imagine that incumbrances of this kind stood upon a distinct ground, and did not fall under the general provisions of the law, respecting the payment of debts; but that arises from the circumstance, that many of these cases were

decided at periods, when the nature of a mortgage debt was not thoroughly understood. Since that has been ascertained, there is, generally speaking, very little difficulty in fixing upon the fund, which ought to be liable to pay off mortgages.

It has long been holden, that a mortgage (*a*), whatever be the form of the security, whether it be accompanied with, or be without, a covenant or bond for the payment of the money borrowed, being in the abstract and intrinsically no more than a contract for a *borrowing* and lending, is only a debt, and the estate mortgaged is a pledge by way of additional security for the money borrowed ; and, on that ground, the mortgagee is bound to make good the money, although the land proves a defective security.

A debt is a personal duty, whereby a right to a certain sum of money is mutually acquired and lost.

Debts are of several kinds, usually divided into debts of record, debts by specialty, and debts by simple contract.

(*a*) *Meynell v. Howard.* Pre. Chan. 61.

The

The first and last of the divisions are not material to the discussion of the present question; I shall therefore confine my observations to that division, which includes debts by specialty, with the precise nature of which, so far as applies to the extent of the obligation they impose, and the subjects on which they attach, the reader must be made acquainted, in order clearly to understand the *principles* upon which we must decide, out of what funds *prima facie* mortgages, *qua* such, are to be paid.

Debts by specialty, or special contract, are such, whereby a sum of money becomes, or is *acknowledged to be*, due by deed or instrument *under seal*, such as by deed of covenant, by lease reserving rent, or by bond or obligation (b). Debts upon mortgage likewise fall under this denomination; for mortgages are made by deeds or instruments under seal, in which the loan is *acknowledged*. Such debts by specialty, in regard that they were confirmed by special evidence under seal, were ranked in a higher degree than simple contract debts. But whilst the debtor and creditor, and the debt, con-

(b) The recital of a debt under hand and seal has been held to be no specialty debt, although recited in a deed.

1 Vez. 313.

tinued in *statu quo*, no material distinction followed from this superiority, in respect of the fund on which it was chargeable. The advantages in point of proof, arising from the instrument, constituted all the difference; for whether the debt commenced by specialty or simple contract, still it amounted to no more than a personal duty; it gave no lien upon the debtor's estates.

But when the debtor died, then the specialty creditor derived an essential and immediate benefit from the superior degree of his debt; because the representatives of the debtor were bound to class the debts according to their rank, *viz.* as debts of record, debts by specialty, and debts by simple contract, and to apply the funds, appropriated by law to the payment, in that order, until each class was satisfied; so that debts of an inferior degree could not be paid, until debts of a superior degree had been first discharged. These two circumstances of greater convenience of proof against the debtor, and priority of payment, where the matter was adjusted by his representatives, out of the goods and chattels of the deceased (which being the security creditors depended upon, were liable in the hands of the executors or representatives of

of the debtor, as well as in the hands of the debtor himself) seem to have constituted the principal features, which distinguished a specialty from a simple contract debt; for, at common law, there was no execution of land for a *personal duty* against the owner, unless in two cases (*c*); the one in the case of the king by his prerogative, which entitled him *ab origine legis*, to execution of body, lands, and goods; the other, in the case of the heir, if specially named in the instrument, *where otherwise the debt would have been lost*. But a specialty did not bind the heir by virtue of its *intrinsic superiority* or force, but charged him merely as comprehended in the contract, where he was included therein by express words (*d*); for the heir was not, in respect of the lands having descended to him merely, chargeable for any debt or wrong, or trespass of his ancestor, though the executor was, so far as he had chattels or assets, and *that notwithstanding he (the executor) was not named in the contract*.

This exemption of the land from being liable to answer the personal contracts and engagements of the tenant, was one of the accidents

(*c*) *Vid. 2 Inst. 19. Magna Charta, Cap. 8.*

(*d*) *Dyer 271. a. Pl. 25.*

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incidental to the introduction of the feudal law, which protected lands from all ordinary process, in order that the tenants might be the better able to answer the feudal duties to the lord, these being the life and support of that kind of government. And as the land was not originally liable to such personal duties in the hands of the ancestor, so neither was it liable in the hands of the heir, if he was not comprehended in the contract, and bound expressly by the act of his ancestors, whereby he might be made debtor in respect of assets.

But at common law (*e*), from the time of *Edward 2d*, to that of *Henry 4th*, where the ancestor bound himself and his heirs expressly by specialty, the obligee, *if the executor had not assets*, might have had an action of debt against the heir, and, on judgment, became entitled to a special writ (*f*), whereby *all* the lands, descended to the heir, were to be delivered in execution to the debtee, who had recovered, which was a writ grounded upon the common law, and not on any statute. However, at this period, the heir, though named,

(*e*) Poph. 151. Plowd. Com. 441. Dyer 81. 3 Co. 11.
b. 12. 2.

(*f*) Dyer 373. Pl. 14. 2 Roll. Abr. 71. D. Pl. 2.

was

was not chargeable, if the executors had assets; for the land still remained, even at law (*g*), a favoured fund, being considered only as a *dernier* security for a debt, to which the heir became subject, in respect of the contract, to the performance of which he was bound, not as debtor, but in privity, as heir, in respect of real assets descended, if the personal assets failed; for, by the common law, if the heir, before an action brought against him, had aliened the assets, the obligee was without any remedy, which would not have been the case, if the debt had been considered as due from him independent of assets. And though the action in such case was in the *debet* and *detinet*, and not in the *detinet* only, as in the case of an executor, that seems to have arisen from the circumstance, that the right in such case would have been destitute of a remedy, unless such writ could have been maintained, there being no other provided applicable to this case.

Therefore, down to the time of *Henry the Fourth* (*h*), if the heir was sued on the specialty of his ancestor, in which he was also named,

(*g*) 27 E. 3. 82. Pl. 23.

(*h*) Fitzh. Abr. Tit. Dette Pl. 175. 6 H. 4. 2. b.
Pl. 14.

and

and with which he was chargeable in respect of real assets descended, he might have pleaded assets in the hands of the executor the day of the writ purchased. But the law seems to have altered in this respect in the time of *Edward the Fourth* (*i*), for *per Pigot*, 4 E. 4. 25. if a man make an obligation to me, and bind himself, his heirs, and executors, and die, I may elect to sue the heir or executor, *at my pleasure*, and *Mich. 10. H. 7. 8. b.* where, in debt against the heir, he pleaded “assets in the hands of the executor, the day of the writ purchased.” *Vavisor* said, such plea would not be good (*k*). A similar decision was also made on the like plea, in the 3d and 4th of *Elizabeth*. And no instance has occurred to me in later times, wherein assets in the hands of the executor have been considered as a good plea for an heir in such suit (*l*) ; but the debtee has been ever since considered as having an election, where the heir is chargeable, to sue him, or the executor or administrator, at law, to recover his specialty debt from the one or the other as he

(*i*) 4 E. 4. 25. 7 E. 4. 13. a. 14 H. 8. 10. b. Poph. 151. Anderson, 7 Pl. 13. Benl. 162.

(*k*) *Vide Dyer*, 204. b. Pl. 2. 1 Anderson, 7.

(*l*) 3 Bac. Abr. 25.

pleases,

pleases, without regard to the executor or administrator having or being without assets.

The statute of *Westminster* also, which gives the *elegit* (*m*), subjects the lands and goods indifferently to the execution of the creditor.

And the statute of *Acton Burnell* (*n*), and the statute of merchants, in like manner direct that the lands and the goods of the debtor shall be delivered to the merchant by reasonable extent, to hold them until such time as the debt is levied.

The statute staple indeed adopts the old notion (*o*) ; charging the lands only in the event of the goods and chattels of the debtor proving deficient.

And the subsequent statute of *William and Mary*, made to prevent any wrong and injury to creditors by alienation of the lands descended to the heir (*p*), or from the ancestor's devising

(*m*) 13 E. 1. Cap. 18.

(*n*) 11 E. 1. 13. E. 1 Stat. 3.

(*o*) 27 E. 3 Stat. 2. Cap. 1.

(*p*) 3d and 4th Will. and Mar. Cap.

away the lands, makes no provision as to any priority, in pursuing the general assets of the debtor for satisfaction of the debt.

But although the common law, after lands became subject to execution for debt, seems to have relaxed in favour of the creditor, so far as to let him in indifferently on the real or personal fund at his election, it provided no means of adjusting how the burden should be borne as between the heir or terre-tenant, and the personal representative of the debtor. Here therefore equity stepped in, and, considering the common law remedy against the heir, and the statutable provisions against the land, as instituted only for the sake of preventing the creditor from a total loss of his debt, and that, therefore, the ancient common law notion furnished the true principle on which an adjustment ought to be made between the heir and executor (*q*), founded an equity upon the common law notion, and thereupon substituted the heir in the place of the creditor, and fixed the debt ultimately on the personal assets, if sufficient, making the personal, as between the heir and

(*q*) 2 Freeman, 204. 205. 208. Hard. 512. 1 Chan. Ca. 74.

executor,

executor, exonerate the real estate (*r*) ; in which respect that Court acted in conformity with one of its principles, namely, that in all cases when it is a measuring cast between an executor and an heir at law, the latter in equity shall have the preference.

Therefore, although a creditor by specialty may (at law) sue either the heir or executor, and shall have the benefit of his security against the one or the other at his election; yet, if the heir be charged in debt, where the executor has assets, the former may ultimately compel the latter in equity to pay the debt, unless he can shew some special exemption by the act of his testator, upon which he ought to be discharged.

It being then once established, that a mortgage was a specialty debt (*s*), it followed of course that the personal estate was in the first place to answer it in equity, as between the

(*r*) 2 P. Will. 176.

(*s*) Cope *v.* Cope, 2 Salk. 449. Sc. Eq. Ca. Abr. 269.

1 Cha. Ca. 74, 271. 2 Chan. Ca. 5. Ca. T. Talbot, 54.

3 Bro. Par. Ca. 520. 14. Hard. 512. 3 P. Will. 358. Pre. Chan. 455. 3 Chan. Rep. 206. S. L. as to a pledge, the foundation of that contract also being debt, 2 Freeman, 272.

heir at law of the mortgagor and his personal representatives.

But although the principle upon which the heir at law, or *haeres natus*, might compel an executor, in equity, to reimburse him what he had laid out in discharge of a mortgage, or to disencumber the mortgage in his favour, obviously applied with equal force in favour of an *haeres factus*, or one substituted in lieu of the heir at law where such substitution was lawful; that principle not being founded upon the privilege of the heir at law, but upon the nature of the contract, and therefore equally applicable, whether the land passed to one claiming as heir at law, or as heir by constitution of the owner, yet, in the case of *Cornish and Mew* (*t*), which occurred so late as 1677, the Court of Chancery distinguished the case of an heir at law from that of an heir constituted in trust, and refused in the latter case to exonerate the real estate in favor of the trustee; and in the case of *Pockley and Pockley* (*u*), which was agitated in 1681, it is said to have been *then*

(*t*) 1 Chan. Ca. 271.

(*u*) 1 Vern. 36. Chan. Ca. 84. *Et vid.* Lady Middleton v. Sir Thomas Middleton, 2 Freeman, 189. Hawes v. Warner, *ibid.* 277. Bishop v. Sharp, 2 Freem. 276.

only

only lately decided, that an *haeres factus*, or heir by substitution of the whole estate, should be allowed the benefit of having the real estate discharged. But in that case Lord *Finch*, Chancellor, said, that not only he who was *haeres factus* should pray in aid of the personal estate to discharge the real estate, but even an *ordinary devisee* should have that benefit.

Accordingly, in the case of an ordinary devise (*x*), where the defendant's testator having made a mortgage of his lands for a considerable sum of money, by his will appointed them to be sold for payment of his mortgage money, and afterwards devised the lands so in mortgage, *as to one moiety* thereof, to the plaintiff, &c. and made the defendant executor, and devised the personal estate to his executor *for the payment of his debts*: The single question was, whether the personal estate should be applied to discharge the mortgage for the benefit of the devisee? And it was decided at the Rolls that the personal estate should be so applied for the advantage of the devisee, and that decree was confirmed by the Lords Commissioners.

(x) *Johnson v. Milkrop*, 2 Vern. 112.

And

And since the true ground upon which this equity is founded has been ascertained, and the nature of a mortgage clearly understood, this principle has been admitted in its fullest extent as to mortgages.

Thus, in the case of *Pockley and Pockley* (*y*), it was determined, that such debt on mortgage would lessen the widow's customary moiety in the province of *York*; for the custom cannot take place until after the debts paid.

So a mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part by the custom of *London* (*z*).

And although the security be in the nature of a Welch mortgage, in which no certain time is mentioned for redemption, yet the rule has been determined to be the same as to the application of assets; for still the basis of the contract is the debt, and the land is taken *collaterally* as a pledge (*a*).

(*y*) 1 Vern. 36. *Ez Sc.* by the name of *Popley v. Popley*, Ch. Ca. 84.

(*z*) *Ball v. Ball*, cited 2 P. Will. 335, in Note.

(*a*) *Howell v. Price*, Prec. Chan. 477.

But the equity the Court of Chancery affords to a person entitled to a real estate by descent or devise, to have the incumbrances upon it discharged as a debt out of the personal estate, goes no further than as between the heir or devisee of the estate and the residuary legatee; it does not interfere with the disposition of other parts, as specific or general legacies, *a fortiori* not with a widow's right to paraphernalia, and much less with the interest of creditors (*b*).

Although the general rule of equity is to apply the personal estate, in the first place, for the payment of all debts, as well specialty debts, which attach upon the land, as simple contract debts, and it is equally certain that a testator cannot, as against his creditors, exempt the personal estate; yet, as against the heir at law, or the devisee of his real estate, he may at pleasure substitute the real in the room of the personal estate, and charge all his debts upon that fund, though not primarily liable. In equity this may be done, either by an instrument indicating such intention in express terms, or by an instrument implicating a *plain and manifest intention* of the testator to exempt his personal estate, or to give the personal estate

(*b*) *Vid.* 2 Vez. Jun. 64, 65.

as a specific legacy; for he may do this as well as give the bulk of his real estate in that shape. As the consideration of this doctrine naturally arises out of the part of our subject now in discussion, and as, depending merely on questions of intention, it has branched out into a variety of distinctions founded on minute differences and subtle refinements, which have enabled ingenious logicians to discover shades of distinction almost imperceptible to less scrutinizing observers, I shall here call the attention of the reader to this important, and, I may say, curious branch of learning, and endeavour to give a general idea of the criticisms to which it has given rise. In the pursuit of this object, I shall first point out what circumstances have been held, not to furnish an inference, that the owner of both funds meant that the personal estate should not exonerate the real estate, and then I shall shew in what cases the personal estate has been exempted.

In the case of *Feltham and Harlston* (c), it is stated to have been said by *Serjeant Fountain*, and admitted by the *Master of the Rolls*, that if a man devise lands for payment of his debts, and make an executor, and leave a personal

(c) 1 Lev. 203.

estate; no part of the personal estate shall go to the payment of debts; because, by making an executor, the testator's intent appears that the executor should have the goods, the testator having made another provision for the payment of his debts; but if a man disposes of lands for the payment of his debts, and after dies intestate, the personal estate shall be chargeable in the hands of the administrator, for no such intent as before appears.

But the distinction above alluded to has been long since over-ruled, and it has been held, that where the personal estate falls upon the executor *virtute officii*, there the executor shall apply the personal estate in exoneration of the real.

This was the case of Lord and Lady *Grey* (*d*), where the father made a conveyance of an estate to trustees and their heirs, to pay his debts and legacies, and subject thereto for performance of his will; and, at the same time, made his will, and thereby devised that the trustees should pay 2000*l.* a-piece to his sons *R* and *L*, and also 6000*l.* to his daughter, the surplus to his heir,

(*d*) *Lord Grey v. Lady Grey*, 1 Chan. Ca. 296. S. L. *Mead v. Hide, infra. Et vid. Grey v. Minithorpe*, 3 *Vez. Jun.* 106. *Et ibid.* 109.

and made his wife executrix, but gave her not thereby *in terms* the personal estate; and it was decreed that the personal estate should be accounted for in aid of the heir, as well with regard to what he should be charged for the creditors, as for the legacies.

And it was decreed in Sir *Peter Soame's* case (*e*), where a father died intestate, leaving a mortgage on his real estate made by himself, that the personal estate should be applied to pay off the mortgage, although the younger children were thereby left destitute.

And the rule of equity is equally applicable, where there is a *gift* of the personal estate to the executor, if nothing be done to shew that he is meant to take as a *legatee*, and not as executor merely.

Thus, where one (*f*) devised his personal estate to his wife, whom he made executrix, Lord *Somers* decreed, that she took it as executrix, and that the personal estate was to be applied in the exoneration of the real estate.

(*e*) Sir Peter Soame's Case, cited 1 P. W. 694.

(*f*) *Cutler v. Coxeter*, 2 Vern. 302. 1693.

So, although the bequest to the executor were by way of residue, the personal fund would nevertheless be liable to exonerate the real estate; and, therefore, should one bequeath several specific legacies out of his personal estate (*g*), and afterwards, in the conclusion of his will, give and devise all the rest and residue of his personal estate to his wife or a stranger, whom he thereby made an *executrix or executor*, the personal estate would be first applied towards the payment of specialty debts for the benefit of the heir.

Thus, where a man devised several legacies, subject to particular charges thereon, and gave the surplus of his personal estate to his wife, the personal estate was directed to be applied in ease of the real (*h*).

And, on this principle (*i*), where one devised the surplus of his estate, his debts and legacies being paid, to his wife and his eldest son *John*, equally to be divided between them, and added, *whom he made his executors*; and farther willed

(*g*) Anonym. 2 Vent. 349. *Noke, exec. of Medlicot, v. Darby*, 3 Bro. Ca. Parl. 290.

(*b*) *White v. White*, 1 Vern. 43.

(*i*) *Et vid. Barton et al. v. Stone*, 2 Vern. 308. 1693.

that she should continue his true widow, but if she married again, his will was, she should render the right of being executrix to his son *Roger*, to be partner with his brother *John* in the executorship; the widow of the testator married, and the question was, whether by the marriage she had forfeited her share of the surplus? It was held by Lord *Somers*, upon the authority of the last-mentioned case, that she had; *for she took as executrix, and not as legatee.*

I should here observe, that the circumstance of the bequest, and the constitution of executor, being in the same sentence, and in favour of the same person, has been sometimes considered as an important feature in these kind of cases; and the cases of *Cutler* and *Coxeter*; and of *Barton* and *Stone*, have been occasionally resolved upon that principle; and it appears to me, that this circumstance is material as furnishing an index to the then state of mind of the testator; it implicates the fact, that the testator contemplates his legatee as his executor, his executor as his legatee, and that, therefore, as he speaks of them in the same breath in both characters, he shall be taken as viewing both characters indifferently, and as one. But the opposite inference was discussed before Lord

Harcourt,

Harcourt, in a case which arose upon the will of Lord Chief Justice *Hale* (*k*), and disallowed; the circumstances of that case, so far as are material at present, were as follows: Lord Chief Justice *Hale*, after giving away his study of books to such of his grand-children as should study the law, and his mathematical instruments to his wife, devised the rest and residue of his personal estate to his wife, and then went on and gave several other directions, touching other things, and, in the close of his will, said, *I do hereby make and ordain my said wife sole executrix of this my last will and testament.* And one question was, whether the express devise to the wife, of all the rest and residue of his personal estate in one part of the will, should be so coupled with the last clause, whereby he made her executrix, as to be all one with the case, where a man devised all the rest and residue of his personal estate to his wife or any other, whom he thereby made executrix; or whether this devise of the rest and residue of his personal estate, being a distinct and independent clause, should be looked upon as a specific legacy to her, and to exempt such residue from being applied in the first place towards payment

(*k*) *Hall v. Brooker*, Gilb. Rep. Eq. 73.

of the debts, in ease and exoneration of the real estate expressly devised for that purpose, as it would have been if another person had been made executor? Mr. *Vernon* insisted that it should be exempted; that here he gave her the residue of the estate as a legacy, before he seemed to consider who should be his executors; that the making the executrix was in a distinct clause after, and had no relation to the devise in the will to her before; but Lord Keeper *Harcourt*, inclined that it would be all one. And this seems reasonable, if the principle on which the cases last alluded to stand, be that since the devise to the executor is perfectly superfluous and idle, and no more than the law would say, were there no such express devise, the executor must take such residue in the same manner as he would have done had it been left generally to fall upon him as executor; and therefore, such executor must take the personal estate after payment of debts and legacies thereout, as the proper and obvious fund for that purpose, and to the payment whereof his office of executor obliges him.

There are several ways, by any of which a man may subject his real estate, to the payment of both specialty and simple contract debts;

as,

as, by conveying his estate to trustees for a term of years or in fee, in order to pay the debts; or by way of charge in equity, which the Court of Chancery will decree to be performed; or he may direct that his real estate may be sold for payment of his debts; but which ever of these modes he adopts, none of them will make the real estate first chargeable; if there be not in the will, either express words, or a manifest intent to discharge the personal estate, it will nevertheless be first liable (*l*): for the same principle on which a court of equity raises an equity in favour of the *hæres natus*, or of the *devisee*, against the personal representative in respect of debts, which, in their original nature, attach upon the real fund, equally pervades the case, notwithstanding such provision be made as to them; for the rule springs out of that great source from whence most of our principles relating to real property are derived, the feudal system, and has for its object, the protection of the freeholder; and there is the same reason for raising an equity in his favour, where his estate is rendered liable to the debt by the act of the owner, as where it is rendered liable to the debt by the act of law:

(*l*) *Vid. Burton v. Knowlton*, 3 Vez. Jun. 107. *Brummel v. Prothero*, *Ibid.* 111.

but

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but another principle interferes, as to simple contract debts so charged, for such will, to that extent, is a disinherison of the heir, which, upon the old maxim of law, cannot be effected but by express words or necessary implication. Besides, in both instances, equity acts in conformity with the general construction it puts upon such provisions; because every provision of this kind takes effect through the medium of a trust either expressed or implied. Now a trust does not affect the rights of parties interested in the thing bound by it, farther than the object in view requires. In whatever mode the estate is charged, subject to the charge it belongs to the heir. It is his land. He may pay the debts, and call for a conveyance. The same observation applies to the *haeres factus* or devisee. Whether the estate come to the devisee charged with the debts, or be devised to a trustee for a term to secure the debts, or be absolutely given for that purpose, it is notwithstanding the estate of the heir or devisee, though subject to the charge. The same policy therefore which raises an equity, where there are specialty debts in favour of the heir, dictates the same equity where simple contract debts are, by the testator, placed on the same footing as specialty debts.

Therefore,

Therefore, notwithstanding the real estate be bound by way of charge in equity, which the Court of Chancery will decree to be performed, yet it shall be exonerated by the personal estate.

Thus, where one by her will said, “I devise to *A B*, my heir, *Clifton* lands (*m*), he *paying* all debts and legacies charged on these lands, and after his decease (*n*), to my nephew *B*,” and in another part of her will, said, “I leave my jewels, plate, pictures, medals, and furniture, to my two executors, to be equally divided,” and in the last clause of her will, said, “*Creating St. Mary's*, and *Creating St. Olive's*, I make liable to all debts, notes or bonds, I have contracted since 1735, if any, and what remains to be paid to *D*, after the *Creatings* are sold.” Lord *Hardwicke* held, that the making a particular estate in the land liable to pay debts, did not exonerate the personal estate; because it was the material fund for the payment of debts: and his Lordship was of opinion, that the residue of the personal estate ought in this case, to be applied in exoneration of the real.

(*m*) *Bridgman v. Dove*, 3 Atk. 201.

(*n*) *Et vid. Bartholomew v. May*, 1 Atk. Rep. 487.

So where *D* by will devised several legacies (*o*), and *inter alia*, twenty pounds to *H*, and made his executor, and devised his real estate to *M*, paying his debts and legacies; and devised, that if he did not pay the legacies in three months, and the debts in two months, the legatees and creditors might enter and hold till satisfied. It was decreed, on a question, whether the personal estate should be applied in ease of the real estate, that it should; for that the devise amounted but to a charge upon the real estate, and intended not to avoid the estate in case of non-payment.

Again, if lands be devised for the payment of debts and legacies (*p*), and the residue of the personal estate be given to executors after the debts and legacies paid; the personal estate shall notwithstanding, as far as it will go, be applied to the payment of the debts, &c. and the land charged no farther than is necessary to make up the residue.

So, where a man devises his estate to his trustees to be sold for payment of his debts, the personal estate shall nevertheless exonerate it as

(*o*) Mead *v.* Hide, 2 Vern. 120.

(*p*) Anon. 2 Ventr. 349.

against

against a residuary legatee; for the residue implies, *after debts and legacies paid.*

Thus, where a man devised all his freehold houses, lands, and hereditaments (*q*), in *W*, to three trustees, to hold to them in trust, that the freehold estate should be subject to, and be sold and disposed of by them for payment of his just debts (*r*); and, after disposing of some particular legacies, gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate, not before disposed of; the question was, whether the personal estate should be first applied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose? It was insisted, on behalf of the *residuary legatee*, that the real estate being not only made subject, but directed to be sold for the payment of the debts, the personal estate should not be applied for that purpose. But it was held *per totam curiam*, that here being no negative words to exclude the personal estate from being applied for the payment of debts, it ought to be first applied for the benefit

(*q*) *Fereges v. Robinson*, Bunn. 301. *Lovel v. Lancaster*, 2 Vern. 183.

(*r*) *Quære*, whether in this case the legatee was executor?

of the heir at law. And it was decreed accordingly.

And the rule of law is the same, if a term be created expressly for payment of debts. The personal estate shall be applied in ease of the real.

Thus, where one, after several particular legacies, devised all his goods and chattels to *A B* and *C*, *to their own disposition*, and made them executors (*s*); and by indenture of the same date, demised several manors and lands to *A* and *C*, for 500 years, in trust for himself for life, and after his death upon trust, out of the rents and profits to pay his debts, legacies, and funeral expences, and four years afterwards to attend the inheritance; on a bill exhibited by the heir at law of the testator, to have an account of the personal estate, and of the rents and profits of the real estate, and that the personal estate might be applied to pay debts and legacies, in ease of the real, it was insisted by the executors, that they were entitled to the personal estate as a legacy; but it was decreed, that the personal estate should be applied in exoneration of the real.

(*s*) *Cook v. Gwava*s, 9 Mod. 188.

So,

So, if the provision be made in the shape of an express trust of the inheritance, the rule will still be the same.

Thus, in case of *Lovel and Lancaster* (*t*), where *T S* devised land to *A B*, for payment of debts, and devised to *T D* certain lands, which the testator in his life-time had mortgaged, and likewise gave him his personal estate; the question was, whether *T D* should have the benefit of the trust for payment of debts, so as to have the money owing on the mortgage paid off by money raised out of the trust, that the land might come to him clear of the debt owing to the mortgagee? And it was held, that he must take the mortgaged land, *cum onere*; and that the personal estate also, though devised to him, must nevertheless be subject to the debts, notwithstanding lands were devised for the payment of them.

The circumstance of the personal estate being given to a person, and that person being named executor in the same sentence in which such bequest is made, has been considered, as well in cases where a provision is made for payment

(*t*) *Lovel v. Lancaster*, 2 Vern. 183. *Vid. Pre. Ch. 3.*
2 P. Will. 335, 190.

of debts by charge, &c. on the real estate, as in cases where specialty debts are indifferently chargeable on both funds, as furnishing evidence, that such person is intended to take the personal estate in his official character, and not as legatee; for it has before been observed, it is to be presumed, that the testator, speaking the whole in the same breath, has but one design, *viz.* to give the personal estate to him as executor, who, in the same moment that he gives him his estate, he constitutes executor.

The case of *Broomhall and Wilbraham* (*u*), furnishes an instance of this kind. There a testator devised in the following words, *viz.* all my personal estate, of what nature, kind, or quality soever, I give to my sister *A*, whom I make my executrix; and all my real estate, of what kind, nature, or quality soever, I give unto my sons *B* and *C*, *chargeable with my debts*. And it was held at the Rolls, that the personal estate should be first liable, and that decree was afterwards affirmed.

And this circumstance, of the bequest of the personal estate being in the same clause, in which the legatee was named executrix, was

(*u*) Cited Ca. T. Talbot, 204.

considered,

considered, in the case of *French and Chichester* (*x*), as it is reported in *Vernon*, as demonstrative, that the legatee was meant to take as executrix; and *that*, although the legacy was in favour of a wife, and the testator *expressly declared* in his will, that the same was given her as a compensation for her own inheritance, with which her husband had prevailed upon her to part.

This case came on upon a bill of review. The error assigned and relied on was, that *John Chichester* (*y*), as heir and executor to his father, having raised sufficient out of the real and personal estate for payment of his sister's portions, devised to them by his father's will, and having paid all but one sister, who was under age, did by deed convey several lands to trustees for payment of his debts; and afterwards made his will, and thereby also directed that his trustees should, out of his trust estate, pay his debts, *legacies and funeral*, and thereby devised to his wife, "whom he made his executrix" (*z*).

(*x*) 2 Vern. 568.

(*y*) *French v. Chichester*, 2 Vern. 568. *Vid.* the authority of this case, questioned by *Lord Talbot*, C. A. Temp. *Talbot*, 209. *Vid.* *Brummel v. Prothero*, *infra*.

(*z*) *Note.* This I take to have been the language of the will. *Vid. supra*. 820, 1. *Cutler v. Coxeter*, *Barton v. Stone*.

all his personal estate not otherwise disposed of, intending thereby *a provision* for her, *she having been prevailed upon to sell away part of her own inheritance.* And the question was, between the heir and executor, whether the wife and executrix should have the personal estate as devised to her, and leave the debts charged upon the land; or whether the personal estate should be applied in ease and exoneration of the real estate? On the part of the wife, it was insisted, that the testator, having charged his debts upon his land, and afterwards by his will having charged even his legacies and funerals upon his land, and devised his personal estate to his wife, did sufficiently manifest his intention, that his wife should have his personal estate as a provision for her, and to her own use; and that the same was but a small recompence for what she had parted with; but if made liable to debts, *the whole would be exhausted*, and the provision intended for the wife defeated; and that the known rule was, that where the personal estate was devised away, the heir should not have it applied in exoneration of the real. But the Lord Keeper *Wright* upon the former hearing, and the then Lord Keeper *Couper* on the bill of review, were both of opinion, that the *devise*

wife being in the *same clause* in which *she was named executrix* (*a*), and not said free and exempt from payment of debts, she must therefore take it as executrix, and the same must be applied for payment of debts; and the demurrer was allowed, and the bill of review dismissed.

But Lord *Talbot*, in the case of *Stapleton* and *Colville* (*b*), although he admitted, that the circumstance of the personal estate being bequeathed, and the legatee being named executor in the same clause, had been considered of great weight in such cases, and had in some instances been decisive, as furnishing an inference, that the executor was to take as executor and not as legatee, and consequently subject to the exoneration of the real estate; yet doubted the authority of *French* and *Chichester*, if that circumstance was the only one on which it was grounded: for his Lordship thought, that there was a plain difference, as between the case of making a man executor,

(*a*) Note in *Bamfield* and *Wyndham's Case*. Wife made executrix in same clause, yet took exempt. *Vid. infra et note distinction.*

(*b*) *Vid. infra.*

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(*b*) *Vid. infra.*

and the making him likewise a legatee of the personal estate; because, if the executor died in the first instance intestate, before probate, the representative of the testator was entitled to the administration; whereas, in the latter instance, there being an express gift to him, he took as legatee, and consequently upon his death his representative would be entitled to it, an interest being vested in him in his own right, in the one case, but nothing at all in the other until he had converted it.

And Lord *Talbot*, in the before-mentioned case of *Stapleton* and *Colville*, observed further, that, in the case of *Broomhall* and *Wibraham* (c), it appeared, that, had the real estate which was devised to the sons been charged with the debt, they would have had nothing, and the testator's sisters, who were the devisees of the personal estate, would have ran away with the whole; and that the question being between the testator's own children and his sisters, it was natural and just to construe the intent in favour of the children, and to lay the load on the personal estate.

(c) *Supra* 832.

However,

However, I am inclined to think, that the decree in *Broomhall* and *Wilbraham* might, upon the authority of the cases, of *Cutler* and *Coxeter*, and *Barton* and *Barton* (*d*), be supported upon the circumstance of the bequest being comprised in the same sentence, in which the legatee was made executrix, without having recourse to the equitable ground taken by his Lordship; because there appears to me, no reason to distinguish this case from those to which I have alluded, unless upon the ground, that in the case of *Broomhall* and *Wilbraham*, the debts were provided for by a charge on the real estate; but that seems to be no ground for exempting the personal estate, that circumstance *alone* being considered only as enlarging the fund, and not as affecting the equity, as between the heir and the executor. And it seems to me, that the case of *French* and *Chichester* is distinguishable from the cases of *Cutler* and *Coxeter*, *Barton* and *Barton*, and *Broomhall* and *Wilbraham*, on the ground that the personal estate being given as a provision for the wife, and in respect of her having been induced to part with her own inheritance, *rebutted any equity* that might have arisen in

(*d*) *Supra.* 820, 1.

favour of the heir, had those circumstances been out of the case.

And though an estate be devised to be sold out and out for payments of debts and funeral expences, with a particular disposition of the surplus money ; yet if the personal estate be not otherwise disposed of than by the appointment of an executor, the personal estate will be liable to exonerate the devised estate : and the devisees of the surplus will be entitled to call upon the executor in equity to reimburse them out of the personal estate, so much of the fund arising by sale of the real estate, as has been paid in discharge of debts and funeral expences, in exoneration of the personal estate (e).

The principle upon which courts of equity proceed in all these cases is, that the testator's intent must govern the construction of his will. The barely charging a man's real estate with his debts, or conveying them to trustees in trust to pay his debts, does not evince a design to exempt the personal estate primarily charged therewith, or at least it is not in point of law

(e) *Vid. Gray v. Minithorpe*, 3 Vez. Jun. 103.

conclusive

conclusive evidence to that extent, because the personal estate is positively liable in equity, independant of the will; it therefore requires negative words in the will, or something tantamount to rebut this conclusion of law, and exempt the personal estate; but the merely rendering another fund liable, implicates no such intent; for, *prima facie*, it imports nothing more than the testator's intent to render his real estate liable as an accumulative fund, in case of any deficiency in the fund primarily liable; nor does the gift of the personal estate to one constituted executor in the same breath mend the case; because in doing that, the testator only makes a positive disposition of the property there, where the law would have thrown it, had nothing been said; it is therefore only *expressio ejus quod tacite inest*. The two circumstances, taken together, cannot furnish any inference beyond that, which the strongest circumstance viewed distinctly would reach, and neither circumstance taken separately is sufficient to rebut the equity in favour of the heir.

And wherever an executor takes a sum of money, *qua* executor, whether such a sum be payable out of a personal or real estate, it will

be liable to exonerate his testator's real estate from debts.

Thus (*f*), where one devised 100*l.* and all his books to *A* and *B*, whom he afterwards made his executors, and gave a copyhold estate to *C*, he causing to be paid to his executors the sum of 100*l.* and, *after payment of debts and legacies*, gave the residue and remainder of all his estate freehold, copyhold, leasehold, plate, rings, stock, &c. to the governors of the Foundling Hospital, and their successors for ever; one question was, whether this 100*l.* should be subject to the testator's debts? *Et per Lord Hardwicke* Chancellor, the first question is, in what capacity the executors take; for if they take in the capacity of executors, the money must go for the purposes in the will. And I am of opinion they take as executors; any other determination would break in on an established rule, and make a precedent of bad consequence, by saying that when they take barely by the name of executors, they shall take for their own use. In every case where real estate, or a sum of money out of it, is given by the name of executors, it shall be considered as given in that light, and for the

(*f*) *Arnold v. Chapman*, 1 Vez. 108.

purposes

purposes of the will, and this is consonant with other cases applicable to the office of executors, which are as strong as the present. For instance, the lands of a villain are assets, so was the villain himself; therefore what comes as accrue from him must be assets. Though the executors had died before the testator, it would have been a good bequest of this 100*l.* charged on this copyhold for the purposes of the will, so far as it could take effect, that is, for debts and legacies; and if one of them should die, it would survive to the other, and there is no determination to the contrary. It must therefore be considered subject to that duty, which is upon them by their office; and it is material that when he speaks of them with relation to their office, he calls them executors; where he gives to themselves, he calls them by their own names.

But, as we have observed, if there be express words, or a plain necessary implication arising from the words of the testator, or deducible from the manner in which he disposes of his property, of his intention to exempt his personal estate from his debts, and to substitute the real in the room of the personal estate,

estate, this he may do, and the law will support him in it.

First it may be done by express words, which may be either positive, or implying a negative.

By positive words (*g*), as if a man devise lands to be sold for the payment of debts and legacies, and *will that his personal estate shall not stand or be charged, or liable thereto*; or if the devise for sale of lands for the payment of debts be general, and the testator afterwards devises all the rest and residue of his personal estate, *having already made provision* for the payment of his debts and legacies out of his real estate, or out of such particular lands, or such like clauses; in these cases the real estate, so subjected, shall not be exonerated by the personal.

Thus, where Sir *William Lemon* (*h*), possessed of a real and personal estate, the former incumbered by several mortgages of his ances-

(*g*) Per Lord Harcourt, Keeper, Gilb. Rep. Chan. 73, 74.

(*b*) *Leman v. Newnham*, 1 Vez. 51.

tors,

tors, made his will, in which was inserted this particular clause; “ I desire all my debts may be discharged by my executors, I mean those only of my own contracting, not those heavier debts charged by my family;” and, after giving several legacies, gave his personal estate to his mother, whom he made executrix, desiring her to pay all his just debts exactly; the mother, after the making the will, brought in the mortgages, which were assigned to her, and for the payment of which the son entered into a covenant. He died in 1741, there having been no payment or demand of principal or interest for twenty years. In 1744, the mother brought a bill against the present plaintiff and defendant *L* and *N*, who were the co-heirs at law of her son, for payment of the mortgages, or else to foreclose. Afterwards, she dying, made *L*, one of the co-heirs, her executor, who got his name struck out of the original, and now brought a bill of revivor against the other co-heir for a sale of the mortgaged estate; and that, out of the money arising thereby, the principal and interest due should be paid by *N* the defendant: the plaintiff claiming by a double right, as executor of the mother, who stood in the place of the mortgagee, and as co-heir of her son; one question was, out of what

what fund these mortgages were to be paid? And it was held by Sir *William Fortescue*, Master of the Rolls, that the will, by which it was agreed that he had a power to charge his real or personal estate with these mortgages, was the proper rule to go by, as far as it directed; so that the question was, whether, and how far, it had done so? It had been insisted, that the personal estate, being the proper fund, could not be discharged without particular words; and that, therefore, though there was a direction for payment of the debts out of the real estate, that would not change the fund, but would only make good any deficiency of the personal estate. That was the general rule, but here there were express words of exemption. It had been said, that, though there was this exemption in the first clause, it was not in the latter, where the testator directed all his just debts to be paid exactly. In answer to which the Court said, it was a constant rule, that one part of a will was not to be construed contradictory to another, if both would stand; and, when the testator had so particularly explained what he meant by his debts, it would be hard to give it a different construction.

By

By words implying a negative (*i*). As where *M*, seised in fee of lands, devised them to his wife for eighty years, if she should so long live, and afterwards to trustees for ninety-nine years in trust, that by the perception of the profits, or by the sale of the said estate, they might pay his debts with remainders over; and devised to his wife all his plantations in *Nevis*, and his negroes, servants, goods, stocks, and all his personal estate whatever to her own use, having charged his real estates for the payment of his debts, that his personal estate might come clear to her, and made her sole executrix and died: a bill in Chancery was exhibited by the wife, to enforce the trustees to sell the lands, or so much thereof as would be sufficient to raise money for the payment of the debts; or that, if she should be compelled to pay them out of the personal estate, then that the lands might be conveyed to her to reimburse her. It was contended that the personal estate ought in the first place to stand charged, and not the real, until the personal should prove deficient. But the Court decreed the trustees to execute the trusts by sale of the lands appointed to be sold to pay the testator's debts.

(*i*) *Lady Anne March v. Fowke et al.* Finch's Rep. 414.

Secondly,

Secondly, from the general frame and scope of the will, as displaying a manifest intention of the testator to exempt his personal estate.

And the mere circumstance (*k*), that both funds are given to the same persons, furnishes great room for presuming, that the personal estate is not intended to be exempted from exonerating the real estate.

Thus, where *A*, by will, devised his household goods, and furniture to *B*, and 100*l.* to *C*, payable at twenty-five, and likewise 50*l.* to *D*, payable at twenty-five, and devised all his manors, lands, tenements, and hereditaments, to trustees and their heirs in trust for the payment of his debts, legacies, and funeral, and then by his will expressly charged them with the payment thereof, and directed that his trustees should reserve the rents and profits of his estates till *C* should attain his age of twenty-five years, and thereout allow him 25*l.* a year; and 20*l.* a-piece to *C* and *D*, until they should attain their ages of twenty-five years; and devised the residue of the rents and profits of the said estate, together with the same estate to *E* in tail male, remainder to *C* and *D* in tail male successively, remainder in like

(*b*) Dolman v. Smith, Pre, Chan. 456. 2 Vern. 740.

manner to three other persons, with remainder to the right heirs of one of them, who was a stranger, and no relation to the family; and then devised several things to go along with the estate as heir-looms; and afterwards devised all the rest and residue of his goods, chattels, and personal estate before unbequeathed to *C*, and made the trustees his executors, and died. The question was, whether the personal estate belonged to *E*, exempt from debts, legacies, and funeral expences, or whether it should be applied in the first place towards satisfaction thereof, notwithstanding the express charge on the real estate for payment? And Lord *Cowper*, on the whole frame of the will, was of opinion, that the personal estate was to be applied in the first place, in ease of the real estate: First, because there was no express clause to exempt the personal estate, which had been always a distinction taken in the Court of Chancery. Secondly, because it appeared that the heir of this family was not to have the real estate till his age of twenty-five years; nay, not so much as the rents and profits, which should actually fall and become due, before that age; that the testator appeared throughout to carry a very frugal intention, and therefore would allow his heir no more than 25*l.* a year for

for his maintenance, and that too carried beyond the usual time of his age of twenty-one years; for he was to be trusted with nothing more, even till his age of twenty-five years. Could it then be thought that he intended indefinitely to trust him with the personal estate, without limitation to any age, so that he might squander it all away, and waste it as soon as ever he came to it? that both the real and personal estate were in this case to come into the same hand, and, therefore, he could have no such frugal intention with regard to the one, and leave it so loose with regard to the other. And his Lordship decreed the personal estate to be subject, in the first place, to the debts and legacies.

So (*l*), where one devised all his lands, tenements, and hereditaments, in the counties of *W* and *M*, to trustees, in trust by rents and profits, sale or mortgage, to raise so much money as would pay his debts, and interest for the same; and, after payment of his debts, that they should stand seised of such part of his estates as should remain unsold to and for such person and persons as should be entitled

(*l*) Hazlewood *v.* Pope, 3 Peer Will. 323. *Ez: vid.*
Dolman and Smith, *supra*.

to his settled estate ; and if any money remained after payment of the debts, the same should be paid to his daughter, or such other person as should be entitled to the said other estates, and he gave all his personal estate to his said daughter, and made her sole executrix : Lord *Talbot decreed* the personal estate to be applied in the first place to the payment of debts ; his Lordship chiefly grounded his opinion upon the circumstance, that the same person was devisee of the personal, and also devisee of the surplus of the real estate in tail ; for he could not think it was the intention of the testator to exempt his personal estate from his debts, for no other reason, but that his daughter might dispose thereof by her will, under her age of twenty-one, on purpose to leave the real estate of the testator, and which was settled on herself in tail, the more incumbered.

So in the case of *Harewood and Child*, where the words were (*m*), “ I devise all my manors “ to *A* and *B*, and their heirs in trust, that “ they and their heirs, out of the rents and “ profits, or by lease or mortgage, or sale “ thereof, or any part thereof, shall raise so

(*m*) *Harewood v. Child*, cited Ca. Temp. Talbot. 204.
This seems to be the same case as that last cited.

" much money, as I shall owe at my death;
 " and after payment of my debts, and reim-
 " bursing themselves upon farther trust, that
 " they and their heirs shall stand seised of such
 " part of the premises as shall remain unsold,
 " to and for such persons and uses as the manor
 " of *C* is already settled, and if any money
 " remains after payment of my debts, it shall
 " be paid to my daughter, and such as are
 " entitled to the said manor, by the limitations
 " aforesaid." He had already given the manor
 of *C* to his daughter in tail, with remainder to
 his nephew, and then he gave all personal
 estate, of what nature or quality soever to his
 daughter, whom he made executrix: and it
 was held, that notwithstanding this express de-
 vice to the trustees, the personal estate should
 be first applied in discharge of the real.

Lord *Talbot* himself states the ground on
 which he determined this case (*n*), in that of
Stapleton and Colville; he says, the opinion of
 the Court was founded upon the contemplation
 of the will, which being taken together, mani-
 fested the intent to be, that the daughter
 should take the personal estate, liable to the

(*n*) Ca. T. *Talbot*, 208.

payment

payment of his debts, she herself being devisee of the whole ; and it would have been absurd to imagine, that the testator meant his personal estate to be exempt from the payment of his debts, when he had expressly provided, that the surplus of the produce of what should be raised out of the real estate, should go to the same person, who was devisee in tail of the real estate.

But if the *whole* personal estate be given, in some sort, as a specific bequest, and there be a provision for the payment of debts out of the real estate, and the consequence of charging the debts on the personal estate, will be to exhaust the whole of it, the personal estate will be exempted ; because, in such case, it is presumed, that the testator meant some benefit to the legatee, to whom he has given his *whole* personal estate.

The case of *Bamfield* and *Wyndham* is an instance of this sort (o). There *I S* devised all his manors to trustees and their heirs, in trust immediately out of the rents and profits, or by sale or mortgage of the premises, or any part

(o) *Bamfield v. Wyndham*, Pre. Chan. 101. *et vid.* 3
Vez. Jun. 105.

thereof, to raise and levy money for payment and satisfaction of all his just debts, with interest and charges of the trustees; and if there should be a surplus of lands or money, that to be to his sisters jointly, and their heirs; and *all his personal estate* to his dear wife, whom he made sole executrix. The question was, whether the wife should have the personal estate exempt from debts, or whether that should be applied in the first place towards the payment of them? for it was urged, that the devise being to her, who was made executrix, she should take it only as executrix. Lord *Somers* took notice, that the debts were more than the personal estate amounted to, and therefore, the testator must mean, that the wife should have it exempt from debts, or he must mean nothing; and he said, there was in this case no room to make a different construction.

The reader should here be apprized of the distinction between the last case, and that of *French* and *Chichester*, before-mentioned in this chapter; for they approach each other so nearly in circumstances, that without the most cautious attention, they appear to have been decided in direct opposition to each other; for, in both cases, the legatee was the wife of the testator,

testator, and was made executrix in the same sentence, in which the personal estate was given; and, in both cases, the personal estate was inadequate to discharge the debts, &c. and consequently, the legacies would be defeated if it was so applied; both cases are decided by persons of the first judicial authority, and yet the adjudications are different. But they appear to me reconcileable upon the ground, that the case of *French* and *Chichester* was a disposition only of all the testator's personal estate *not otherwise disposed of*, and so in the nature of a residuary bequest; whereas that of *Bamfield* and *Wyndham* was a disposition of the whole personal estate of the testator as *one entire thing*, and so given specifically; and in that light it is considered by Lord *Hardwicke*, in the case of Lord *Inchiquin* and *French* (*p*); and, if it be so considered, the circumstance, that the legacy will be defeated, if the personal estate is not exempted, is a *material index* to the intention; because it lets in a principle, which has great weight in the construction of wills of personal property, namely, that *prima facie* the testator intends a positive benefit to every specific legatee; which principle does not apply to a resi-

(*p*) *Vid. Ambler's Rep.* 38.

duary legatee, because, in our law, the residuary legatee is not greatly considered, as he was in the Roman law, the residuum being taken with us as merely the gleanings of the testator's estate, and depending upon casualty, whether there shall be any such gleanings or not.

The case of *Kynaston* and *Kynaston* (*q*), must, I presume, have been also determined upon the principle, that, where the *whole* personal estate is bequeathed, and would be exhausted, if applied to exonerate the real, the presumption is, that it was meant to be exempted. In this case, the testator by his will, charged his estates with the payment of all his debts, legacies, and funeral expences; and, for that purpose, he devised particular lands to trustees, in trust to sell the same, and pay his debts, legacies, and funeral expences, and he gave to his wife *all* his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate; and Lord *Bathurst* determined the personal estate to be exempt.

(*q*) *Kynaston v. Kynaston*, cited 1 Bro. Rep. Chan. 457.
Sed vid. infra, Adams v. Meyrick.

And

And this distinction, between a devise of the whole personal estate, and a devise of the residue, was also taken in the case of *Heath and Heath* (*r*), where one, seised in fee of lands, and possessed of a personal estate, having children, and owing money, gave legacies by his will, and directed, *that they should be paid out of his real estate*, and gave *his personal estate* to his children. *Et per curiam*, if the legacies had been only charged upon the real estate, yet the personal estate should have been first applied to pay them, and so should it have been against a residuary legatee; but, in this case, the real estate being the fund appointed, and the *whole* personal estate given away by the will, **THEREFORE**, the legacies must be paid out of the real estate *only*; but the debts shall be still paid out of the personal estate, *the will not ordering the debts to be paid out of the real*.

The case of Lord *Inchiquin* and Lord *Obrien*, is grounded upon this distinction between a disposition of the *whole* personal estate, and a disposition of a *residue* only, in regard to the evidence they respectively furnish,

(*r*) *Heath v. Heath*, 2 P. Will. 366.

to the testator's intention with respect to the exemption of his personal estate.

Lord *Thomond* by his will (*inter al.*) devised in this manner (s) : " As to my worldly estate, both real and personal, I dispose thereof as follows : First, I will that all my debts, which I shall owe at the time of my death, shall be paid," (which was sufficient to charge his real estate with his debts, in case his personal estate had fallen short) and then went on in his will, and devised, " his real estate to trustees, upon trust, that they should sell such a competent part thereof, as should be sufficient for the payment of his debts and legacies." And his farther will was, " that the money to be raised by sale of his real estate, *should be deemed as personal;*" and then he gave all the rest and *residue* of his *personal* estate to Lord *Obrien*, *after payment of his debts and legacies.* And the question was, whether the personal estate, *viz.* that part of it which was properly so, his chattels, should go to Lord *Obrien*, discharged of the testator's debts and legacies. Lord *Hardwicke* said, that there was no case, wherever it was pretended, that the personal estate was

(s) *Lord Inchiquin v. Lord Obrien*, 1 Wilf. 82. S. L. Philips *v. Philips*, 2 Bro. Rep. Chan. 273.

exempted,

exempted, where the *rest* and *residue* was given in this manner, namely, “after payment of my debts and legacies;” and the meaning of the testator must have been, that in case his personal estate should fall short, then that a competent part of his real estate should be sold: but to take off the force of this reasoning, it was insisted, that by these words in the will, “*And my farther will is, that the whole money to be raised by sale of my real estate shall be deemed as personal,*” the testator meant, that so much of his real estate should be sold, as should be equal to his proper personal estate, and should be added to the same, and that out of that aggregate fund, the debts, &c. should be paid, and after payment out of that aggregate fund, the residue should go to the residuary legatee; but his Lordship saw no foundation for this construction; for it was never heard of, that because a residue of a personal estate was given, that, at all events, some residue must pass by the will, for no man could tell at the time of making his will, how his personal estate might be encreased, or diminished, or how long he might live. So he decreed the personal estate to be first chargeable with the debts and legacies.

A similar

A similar decision was made by Lord *Northington*, against the interest of a *wife*, being a residuary legatee, in the case of *Stephenson and Heathcote* (*t*). There, one devised lands in trust, by sale or mortgage, to raise so much money as should be *fully* sufficient to pay all his just debts, and then gave a silver tobacco-box to *A B*, and gave all the *residue* of his personal estate to his wife, and made her executrix; and Lord *Northington* ordered the personal estate to be first applied.

Although the single circumstance of the personal estate being devised to the wife by way of *residue*, seems not of itself to be sufficient to exempt it from exonerating a real estate devised for payment of debts, yet the circumstance of a wife or child being concerned, has generally induced a strong bias on the side of such a construction of the whole will, as will be favourable to an exemption of the personal fund; and therefore the Court of Chancery, especially of late years, since the feudal notion of favouring the freeholder has been growing weaker, and yielded to the more rational principle of complying with the intention of the

(*t*) *Stephenson v. Heathcote*, cited 1 Bro. Rep. Chan. 458. Observed upon 3 Vez. Jun. 106.

owner of both funds, has laid hold of slight circumstances, raising minute shades of distinction, added to the presumption furnished by that of the legatee standing in so favourable a relationship, to take such cases out of the general rule.

The case of *Adams* and *Meyrick* (*u*), furnishes an instance of this kind, and may be considered as the leading authority on this head.

There *A*, by will, gave several pecuniary legacies, and, after, devised lands to trustees and their heirs, in trust, that they DID and SHOULD by mortgage or sale of the said premises, or any part thereof, pay and satisfy his debts, and the said legacies, and funeral expences; then he devised all his goods, chattels, and household-stuff, in such a house, to another; and then went on in these words: “*All the rest and residue of my personal estate, I give and devise to my wife, whom I make sole executrix.*” *Per Curiam*, the residue of the personal estate belongs to the wife, in the nature of a specific

(*u*) *Adams v. Meyrick*, 1 Eq. Ca. Abr. 271. 13. N.B. This case said by Lord Hardwicke to be a weaker case than that of *Walker and Jackson*, *infra*.

legacy,

legacy, exempt from debts, legacies, and funeral expences ; for though the personal estate is the natural fund for them, yet here he has expressly provided another for that purpose, by words of an imperative signification, “*that the trustees do and shall,*” (x) which is stronger than a bare charge of them on his real estate, and might be intended only auxiliary to his personal estate, which will, without words of exemption, be liable, in the first place ; and though the words, “*rest and residue of his personal estate,*” are generally understood rest and residue after debts, legacies, and funerals, yet, here, they are relative to the last antecedent of the devise of his goods, chattels, and household-stuff, at such a house, and pass to his wife as a specific devise, *in the same manner as the next preceding devise did* to the devisee thereof, and are to be understood *the residue of what he had not before particularly devised*, not the residue after debts paid (y).

(x) *Vid. supra*, Stephenson v. Heathcote, which, though very similar to this case, is decided the other way.

(y) But this case may be supported on the same ground as the case of Bradnox v. Gratwick, *infra*, viz. that the devise of the specific and residuary legacy is in the same breath ; and which principle, also, seems to me applicable to the case of Stephenson and Heathcote, which, I take it, was erroneously determined, *et vid.* Wainwright v. Bendlowes, as reported, 2 Vern. 718.

If

If the personal estate, or any part thereof, be given as a specific bequest, the heir or devisee of the real estate, will not be entitled to be exonerated by the personal estate or such part of it as is so given.

The case of *O'Neal* and *Mead* furnishes an instance of this kind, in respect of chattels real (z). There, *A*, seised in fee of a real estate, which he had mortgaged for 500*l.* and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and then died, leaving debts which would exhaust all his personal effects, except the leasehold given to his wife. The question was, whether, there being (as usual) a covenant to pay the mortgage-monies, the leasehold premises, devised to the wife, should be liable to discharge the mortgage? And the Master of the Rolls, after taking time to consider of it, and being attended with precedents, decreed, that as the testator had charged his real estate by this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy, by laying the mortgage debt upon it, as he might

(z) *O'Neal v. Mead*, 1 Will. 693.

have done, had it not been specifically devised; and that, though the mortgaged premises were also specifically given to the heir, yet, in this case, he to whom they were thus devised, must take them *cum onere*, as probably they were intended to pass.

Even money may be specifically devised, but then it must be under such circumstances of locality, and in such a situation, that the legatee may identify it, and say that he has a right to that *very* money in specie; for it is of the essence of a specific legacy, strictly speaking, that, by the assent of the executors, the property, in the identical thing, will immediately vest, and not remain fluctuating, until the arrangement of the testator's affairs; for, if that be necessary, it is not a specific legacy.

Thus, where the testatrix devised 400*l.* to the plaintiff *S*, to be paid to him out of 500*l.* secured by a statute, &c. by *C*, and made the defendant, *B*, her executor; on a bill brought by *S*, against *B*, for payment of the money (*a*), the question was, whether this was a specific legacy? And it was held so to be, and decreed to be paid to the plaintiff.

(*a*) Smallbone *v.* Brace, Swinb. 28. Finch's Chan. Rep. Ca. 303.

So,

So, where *I S.*, having money secured to him by bond, in the names of *A* and *B*, in trust for himself, devised it; the Court held that the devise of this sum of money was a specific legacy (*b*).

Again, where the testator, having devised 3400*l.* to be laid out by his executors in a purchase of annuities, in the Exchequer, for ninety-nine years' term, to be enjoyed by his wife for her life, she releasing her dower, and after her decease to go equally to his two daughters, bequeathed 1000*l.* a-piece to the latter, and died, leaving little more assets than would pay the 3400*l.*; the Court held, that the legacy of 3400*l.* was specific, for it must be taken as the devise of an annuity, and, therefore, was a specific legacy (*c*).

But here we must remark, that the devise of the personal estate must be clear, certain, and exactly defined, not loose and equivocal, or it will not operate so as to alter the ordinary course of applying assets; an infraction upon which, the courts of justice view with a jealous

(*b*) *Lord Castleton v. Lord Fanshaw*, 1 Eq. Ca. Abr. 298, 2.

(*c*) *Burridge v. Bradhill*, 1 P. Will. 127. Swinb. 28. *Sed vid. infra*, this case explained.

eye,

eye, and never permit, but where the intention of the testator (who had an absolute power over his property) to appropriate it otherwise, is clearly expressed, or necessarily implied.

Therefore (*d*), where the testatrix bequeathed several pecuniary legacies, and, amongst others, gave 1500*l.* to her eldest son, in trust, to lay it out in the purchase of land in fee, and to grant a rent-charge of 50*l.* *per annum*, thereout, to his daughter, the plaintiff, *M*, the wife of *H*, for her separate use; but that, if her eldest son should refuse or neglect to lay out 1500*l.* in a purchase, and to grant this rent-charge, then he should have but 500*l.* of the money, and the remaining 1000*l.* should be laid out, as far as it would go, in the purchase of an annuity, for the separate use of the daughter: The question was, whether the 1500*l.* was a specific legacy? And, on the part of the plaintiff, it was insisted that it was; because it was ordered to be laid out in land, and consequently, was to be taken as a devise of land, by which means it was become a specific devise. But Lord *Parker* held otherwise; for, admitting the 1500*l.* legacy should be taken as land, the question would be, what the legacy

(*d*) *Hinton v. Pinke*, 1 P. Will. 539. S. C. Swinb. 29.

was, or how much should be laid out in land? The legatee of the $1500l.$ could not say that she had a right *in specie*. Was it possible, supposing there had been, in the present case, $140l.$ of the testator's money laid upon the table, the legatee could say, that she had a right to this money *in specie*? If not, then it was no specific legacy. But, his Lordship observed, the will saying, that, in case of the son refusing or neglecting to make this purchase, then he was to have but $500l.$ of the $1500l.$ legacy, and the daughter the remaining $1000l.$; therefore, he took the daughter to be a general legatee for $1000l.$

Lord Parker (afterwards Lord Macclesfield) in the last case, said, that though he could not come into the opinion of Lord Cowper, in the case of *Burridge and Bradyl*, (e) yet, if it were insisted upon, he had such a regard for the precedent, as cited, that he would see the decretal order, but this was not urged,

But Lord Hardwicke, in delivering his judgment in the case of *Blower v. Morret*, explains the reason of this seeming difference of opinion between Lord Macclesfield and Lord Cowper, on the case of *Burridge and Bradyl*.

(e) *Supra.*

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and

and confirms the law to be as was held by Lord *Cowper* in that case (*f*). His Lordship observed, that the reason Lord *Macclesfield* was not satisfied with that case, when cited in the case of *Hinton and Pinke*, was, because, according to the book, there was a wrong state of it; namely, barely as though it were a gift of money to be laid out in land, without stating the circumstance, that it was given to purchase an annuity for the wife, *she releasing her dower*, which was the true foundation of that determination; for, his Lordship said, he laid no weight on what was mentioned besides by Lord *Cowper* as of some weight, namely, that the annuities were to go to the children after the wife's death, for that was only as to hardship; nor that it was directed to be laid out in land, which would not vary the case, for it would be still a pecuniary legacy, and must, then, abate in proportion. The strong ground was, that it was a purchase of the widow's dower, by giving her a sum of money in lieu and satisfaction of and upon her releasing it; and the wife might lay hold of that if she would. It was the same as if the testator had said, "I give *A* 500*l.* on consideration that he conveys such an estate to my devisee or trustee."—*A* has then an option

(*f*) 2 Vez. 422. *Vid. Blower v. Morret, ibid.* 420.

to say, that is a contract, he closes therewith, and will make it absolute, and will part with that estate for that money, and then he will not be bound to abate in proportion with other legatees.

And, if ever a residue of personalty should be so devised as to partake of the nature of a specific bequest, that will, also, be exempt from exonerating the real estate.

Accordingly, it is said to have been agreed by the council at the bar, and not denied by the Court (g), that, if the testator's lands were subjected to his debts, and all the rest and residue of his personal estate were given to a stranger, *without any allusion to debts*, and the executorship *bequeathed to the testator's wife, or any other person*; *there*, the residuary legatee would be entitled to have the residue and surplus, so devised to him, exonerated and discharged of the debts; and, in such case, the real estate, expressly charged, or devised to be sold, would, in the first place, be wholly applied to the purpose, and the personal estate would only come in aid of the real so devised to be sold, to supply what the real estate fell

(g) Gilb. Rep. Eq. 72, 73.

hort to make up the debts : for such bequest would operate in the nature of a specific bequest of such residue.

And, in these cases, too much attention cannot be given to the mode in which the personal estate is disposed of, in respect of the general disposition thereof ; the relation between the particular and residuary clauses ; the connection between the testator and his legatees ; the object of the testator in giving his legacies ; and other minute circumstances, which persons in the habit of inspecting wills of this kind will readily perceive ; as trivial circumstances frequently implicate important facts, and furnish decisive evidence of a testator's intention to give the personal estate exempt or not exempt from his debts.

For instance, if a testator appears to have viewed his personal estate as an entire thing, and to have contemplated a positive and express disposition of the whole, and to have deliberated to what extent it should be charged, his disposition will be considered as in the nature of a specific bequest of an entirety, though given in several distinct parts ; and therefore the several parts *with the residue*, in compliance with his intention,

intention, will be construed to make up the whole; and consequently the residuary, or sweeping clause, will not be taken in its ordinary sense, as the residue after payment of debts, but in a peculiar sense referable to the preceding disposition, and involving all that is left, after taking out what has already been given.

The case of the *Attorney General* and *Barkham*, cited in the case of *Stapleton* and *Colville*, furnishes an instance of this kind (h). There the testator devised in the following words: "For the just and true performance of this my last will, and for the payment of all my debts, I give and devise all my real estate; and as to the personal estate, which at the time of my death I shall be possessed of and entitled unto, I give the same unto my executor and executrix herein named, to defray my funeral charges and expences; and, if my personal estate shall fall short to discharge the same, then the remainder to be paid to my executors out of the first rents and profits of my real estate, as they shall become due after my decease, until payment be made of all my legacies, debts, and

(b) *Attorney General v. Barkham*, Ca. T. Talbot, 206.
et vid. Adams v. Meyrick, *supra*, 859.

funeral expences, as aforesaid; and, if there be any surplus of my personal estate, that then my executor pay the same to my dear and loving wife;" and it was decreed, that the personal estate should go to the wife, discharged from payment of debts. The ground of which decision was by Lord *Talbot* said to have been, for that the testator had laid the charge upon the real estate, and then, taking up his personal estate, mentioned particular things which he charged it with, from whence it was concluded that the surplus there meant, must be the surplus after the particular charges there specified.

It seems that upon the same principle (*i*), if a man were to devise his real estates in trust for, and charged with, the payment of his debts, legacies, and funeral expences, remainder in trust for *A B* in tail, remainder over; and then to devise *part of his personal estate* to go along with his real as *heir-looms* (*k*); and afterwards devised all the rest and residue of his goods, clothes, and personal estate, not before bequeathed, to *A B*, and made his trustees exec-

(*i*) *Vid. Dolman v. Smith, supra.*

(*k*) Pre. Chan. 450. Gilb. Rep. Eq. 128. where this proposition is countenanced.

cutors, that *A B* would take the residue discharged from the debts; for, in such case, upon strict grammatical construction, rest and residue not before bequeathed, is properly referable to the bequest which precedes, and then the residue being given to a person not properly affected with debts and legacies, there appears to be no reason to charge him therewith, by inference that it is to be, *after debts and legacies paid.*

Any other circumstance, evincing that the testator meant to shift the burden of his debts from the personal to the real estate, will produce that effect.

Thus, where *A* gave several specific parts of his personal estate, and then gave part of his real estate in strict settlement (*l*), and devised the remainder of his real estate to trustees in trust, to sell for the payment of debts, and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates, and then gave the residue of his personal estate, not before bequeathed, to his wife; the Court held, that she took it

(*l*) *Anderton v. Cook*, 4th June 1775, cited 1 Bro. Chan. Rep. 456.

wholly exempt from the debts. The ground of which determination must have been, that the charge of the deficiency on the devised real estates was demonstration, that the testator meant, that the personal estate should be exempted from the debts.

Again (*m*), where *W* by will devised lands to trustees, to be sold for payment of his debts and legacies, and devised all the residue of his personal estate to his wife, and gave her also 600*l.* *out of the money to be raised by sale of the trust estate*, and made her executrix; on a bill for an account of the personal estate, and to have that applied in the first place, Lord *Harcourt*, Chancellor, observed, that here was not only a devise over of the residue of his personal estate to his executrix, but that he gave her farther the sum of 600*l.* out of the real estate, so that he did not think the residue of the personal estate sufficient for her; which furnished the strongest presumption imaginable of the intent of the testator, that his wife should have the residue of his personal estate, and on this ground dismissed the bill *quo ad* an account of the personal estate.

(*m*) *Waife v. Whitfield*, 2 Eq. Ca. Abr. 374, 22. 8 Vin, Abr. 237, Pl. 19.

Again,

Again (*n*), where one seised of divers real estates, and also possessed of a personal estate; devised that all his estate in *L*, or a sufficient part thereof, should be sold as soon as his executrix conveniently could, for the payment of his lawful debts, and the legacies thereafter mentioned, and the expence of his funeral, &c. he gave to *E* one annuity or yearly rent-charge of 200*l.* to be raised out of all his estate not thereafter otherwise disposed of, in the county of *N.* to be paid her half-yearly; and then, after giving several legacies, lastly, he appointed the above-mentioned *E* and *B* joint executrices of his will. *Afterwards*, and *at a future time*, the testator added these words to his will: “ And I give and devise to them (the executrices) *all my personal estate not herein before devised,*” and then he executed the will over again. The principal question was, whether the personal estate ought, in favour of the heir at law, to be applied in exoneration of the real estate? And Lord *Hardwicke* was of opinion that it ought not, for that there was a manifest plain intention to give the personal estate as a *specific* legacy to his executrices, and to exempt it from his debts; because, after giving several specific legacies, he said, “ Lastly, I ap-

(*n*) *Walker v. Jackson*, 2 Atk. 624.

point

point the above-mentioned *E* and *B* joint executrices of this my will." If the testator had rested there, it was only making them executrices, and the personal estate would have been applicable to exonerate the real estate; but the testator some time afterwards added the words, "and I give and devise to them all my personal estate, not herein before by me devised," and in a formal manner re-executed his will. This, his Lordship said, was an extreme strong circumstance to shew the intention of the testator, and indeed unsurmountable.

So, where the devise of the residue of the testator's effects was made in the same sentence with a devise of specific legacies to the residuary legatee, this was considered by Sir *Joseph Jekyll* as a case of exemption.

In the case alluded to (o), one charged his lands with the payment of his debts, and gave some specific legacies, *together* with the rest of his personal estate, to his brother; in which case, for as much as the specific legacies would be exempt from the debts, as betwixt the devisee of the land and the specific legatee, so the

(o) *Bradnox v. Gratwick*, 20th Nov. 1722, at the Rolls, cited 3 P. Will. 325.

Court declared, they could not sever the specific legacies from the rest of the personal estate; and since the testator equally intended, that the residuary legatee should have the rest of his personal estate, as the specific legacies, therefore all the personal estate was held to be exempt from the debts.

And where the real estate was not only charged with debts, but an actual power was given to the executor, by mortgage or otherwise, to raise such a sum as would be adequate to defray them, Lord *Talbot* was of opinion, this circumstance clearly manifested an intent to incumber the real fund with the debts.

Thus (*p*), where one by will devised his lands to his wife for life, *chargeable* with the payment of *two* annuities for the lives of the annuitants, and likewise with a legacy of 1000*l.* and gave her a *power* to raise, by mortgage or

(*p*) *Stapleton v. Colville*, Ca. T. Talbot, 201. *Et vid.* *Hall v. Brooker*, Gilb. Rep. Eq. 72, 73, a case prior in time, wherein a similar question arose on Sir Matthew Hall's will, wherein a like circumstance appears, *viz.* a power to lease lands for payment of debts; and it seems from Lord Hardwicke's citing this case as an authority in that of Walker and Jackson, that it received a similar adjudication. *Vid. 2 Atk. 626.*

sale of any part of the inheritance, such a sum as would be sufficient to discharge the debts he should owe at the time of his death; and then reciting the great satisfaction he had of his estates having continued so long in his name and family, and the great desire he had to perpetuate, as far as he could, his name and estate, he devised all his real estate (after his wife's death) to his nephew for life, remainder over to his first and other sons in tail, upon condition of their taking and using his name and arms for ever; and in the close of his will, gave all his goods, chattels, and personal estate, to his wife, and made her sole executrix. The question was, whether the wife should take the personal estate exempt and discharged from the payment of debts, or whether the personal estate should not, according to the general rule, be first applied? It was decreed at the Rolls, that the charge should be entirely upon the real estate, and that the wife should have the personal estate to her own use; and that decree was affirmed by Lord *Talbot*, Chancellor, on the ground, that upon the whole frame of the will, such appeared to be clearly the testator's intent. And his Lordship relied upon the circumstances following, *viz.* that after the gift of the *annuity and legacies* wherewith the testator had charged
his

his real estate, he gave his real estate to his wife for life; and although it did not necessarily follow, that the coupling the annuities and legacies together, shewed he intended both to be payable out of one and the same fund (the personal estate being the proper fund for debts, though no provision had been made by the testator, but the annuities having no fund to answer them, except what was particularly provided for them) yet that must have some weight; but then came the power given to the wife, which seemed to him very clearly to manifest this intent that she should take what he had given to her by his will to her own use; for, his intent being to carry down and perpetuate his estate in his name and family, could it be supposed, that after having given his wife the whole power over his personal estate, by making her executrix, he would likewise have given her a power of disposing of so much of the inheritance, and consequently of defeating the devise to his nephew (not of so much as the personal estate should prove deficient, *but of what should be necessary for the payment of his debts*) unless he had intended her the personal estate absolutely to her own use, clear and discharged from the payment of his debts? His intent seemed clear to give her this power of disposing of

of so much of the inheritance as would satisfy his debts, in order to secure her the full enjoyment of her estate for life, and of the personal estate, free from all charges whatsoever.

The reader will no doubt have observed, that in several of the preceding instances, the wife of the testator was the object of his bounty: But although that circumstance might possibly furnish an additional reason in support of those adjudications (because the relative situation of the testator and his legatees, and also of the legatees to each other, are features that ought not to be overlooked in a question upon the intent of a testator, where the influence of natural affections on the actions and inclinations of men are universally acknowledged to have great weight) yet these cases seem to be furnished with circumstances sufficient to take them out of the general rule, without referring to this additional feature, in respect of which they are also distinguishable from the common run of cases.

A condition, *though void*, annexed to a legacy, making it payable out of the land, was held to be sufficient to shew the testator's intent that the personal fund should not be charged with it.

In

In the case alluded to (*q*), *A* by his will, amongst other things, devised as follows: "I give and bequeath to my nephew *B* (who was the testator's heir at law) his heirs and assigns, all my messuages, &c. in the parish of *O*, in the county of *G*," and then reciting that he had promised to give to his neice *W* 500*l.* (to be paid to her within six months after his decease) went on and said, "and my will is, that my said estate at *O* shall stand charged with the said sum of 500*l.* to be paid at the time aforesaid; and I have devised my said estate to my nephew *B*, his heirs and assigns, upon condition he pay the said sum of 500*l.* at the time aforesaid;" and one question was, whether this 500*l.* was charged upon the real or personal estate in the first place? And it was decided by Sir Joseph Jekyl, that the 500*l.* ought to be taken as a charge upon the land at *O* in *the first place*; because the testator did not only charge his lands at *O* with this 500*l.* as he did with several other legacies and annuities, but he distinguished this 500*l.* by devising these lands to *B* in fee, on condition that he paid the 500*l.* and though this was a void condition, as the devisee was heir at law, and none but the heir

(*q*) Whaley v. Cox, 2 Eq. Ca. Abr. 549.

could

could take advantage of the condition, upon which reason also the devise was void, the lands descending to *B*, as heir at law, yet this particularity in the will served to shew the intention of the testator, that these lands at *O* should be applied to the payment of the 500*l.* in the first place, and not the personal estate.

But where the condition, annexed to the devise, was not a condition to avoid the whole estate charged with the debts in default of payment, but was to be taken advantage of by an entry given to the creditors and legatees, it was determined that the personal estate should not thereby be exempted.

Thus where (r) a man made his will, and *I S* his executor, and gave him a legacy of 20*l.* and devised all his lands to *I N* and his heirs, upon condition that he paid his debts and legacies; and if the debts were not paid within two months, then he devised that the creditors and legatees might enter; and the question was, whether in this case the personal estate should be first applied in ease of the real estate? It was contended, that the personal

(r) Gower *v.* Mead, Pre. Chan. 2 S. C. by the name of Mead *v.* Hide, 2 Vern. 120.

estate should not be liable in this case; and it was said, that it was the same as if the testator had devised lands to *I N*, upon condition to pay 2*l.* to *A*, and 2*l.* to *B*, and in that case, without question, the devisee of the lands could have no advantage of the personal estate. But it was held by the Lords Commissioners of the Great Seal (*viz.* *Maynard*, *Keck*, and *Rawlinson*) that the personal estate was first liable in this case; but they went upon different grounds. Lord Comissioner *Maynard* said, that if a man devised his real estate to another, upon condition to pay his debts, and did not dispose of his personal estate, that should be first applied in ease of the real estate; and here the condition annexed to the devise, was not a condition to avoid the whole estate, but only to give an entry to the creditors and legatees. *Keck* rested upon the ground, that an executor did not take on his own account any more than an administrator; and *Rawlinson* said, that there was a diversity betwixt a *hæres factus*, and devisee of particular lands; for a devisee of particular lands should not have the benefit of the personal estate, but *hæres factus* of the whole estate should.

There is also a class of cases, to which this rule, as to the exoneration of the real estate,

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does not apply, but which are frequently discussed as falling under its influence, for want of adverting to the causes on which the rule is primarily founded; for if these causes are not to be found in the case, it is out of both the spirit and the letter of the rule.

It has been observed, that this rule, as to the application of the personal estate to exonerate the real, in cases where the real estate is subjected to debts, or charged therewith, or, where a trust is created for that purpose, was built on feudal notions, to support the tenure, and preserve the feud entire. Then it can never apply, where the feud is to be completely charged; as if the real estate be to be sold out and out, and turned into personality; for, in such case, there is no heir either *factus* or *natus* to be favoured; the sole question lies between the owners of the personality, which of them shall bear the burden, and then it is fair to leave it where the testator has placed it.

Therefore, if a testator directs his lands to be sold and converted into money (*s*), and disposes of all the money to arise thereby, after the payment

(*s*) Ca. T. Talbot, 108. Ackroyd v. Smithson, 2 Bro. Rep. Ch. 503.

of his debts thereout, as money, and gives his personal estate to his executor; this furnishes a strong ground to presume, he intended, that his land should not be exonerated by his personal estate; because, in such case, it is plain that the testator means to reduce his whole estate into one species of property, to be disposed of as he directs; and then the direction, that part of the money to arise by the sale of the land shall be applied to the payment of debts, is in truth only an appropriation of a particular part of that general fund to a given purpose. And in such case, the principle of equity, which induces the Court to favor the *hæres natus*, or the *hæres factus*, does not attach; because the testator leaves no real estate to be preserved for either; on the contrary, the case falls under another principle, of as operative a nature as that, to which we have last alluded, namely, the principle, that whatever is directed to be done, ought to be considered as done, under which rule the land so appropriated ought to be considered as money.

The case of *Wainwright and Bendlows* (*t*), decided by that great master of equity, Lord

(*t*) *Wainwright v. Bendlows*, Pre. Ch. 451. S. C. 2 Vern. 718.—*Note*, this is a specific devise of residue.

Cowper, falls under this distinction. There, one by will devised all his fee-farm rents, in the county of N, to trustees and their heirs, in trust, to sell the same for payment of his debts, and the residue of the money arising thereby, he devised to his two sons equally to be divided between them; then he gave several of his goods to go along with his estate as heir-looms and devised all the residue of his stock, goods, and chattels, to his sister, whom he made his executrix (*u*). The question was, whether the personal estate should be subjected, in the first place, to the payment of debts in ease and exoneration of the real estate devised for that purpose? It was contended, that it should, on the ground that such was the constant course of the court. But it was argued on the other side, that here was an express fund devised for the payment of his debts; and a distinction was taken between a bare charge on the testator's real estate for payment of his debts, as by a devise of a term thereout for that purpose, and this case; for that he had given his lands, out and out, and had parted with them for ever, so that he never intended any of them should re-

(*u*) Note in Vernon, it is said, to be devised to his brother John, his brother Philip, and his brother-in-law, Wainwright.

main in his family; that these lands were therefore to be looked upon as money, and consequently in a Court of Equity, were part of the testator's personal estate, and that the residue of his goods, chattels, and stock, must be intended the residue of those, which were not specifically devised as heir-looms (*x*), and not the residue, after debts paid. Lord *Cowper* was clearly of this opinion, and decreed, that the personal estate was not in this case liable to the debts.

So, in a late case (*y*), where a testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and other debts, *the residue to be added to his personal estate*; the only question was, whether, under this devise, the real estate should exonerate the personal estate? It was contended that it should not. That to produce such effect, there must be a destination, as to the estate to be sold for the mere purpose of the

(*x*) *N. B.* This last distinction of Lord Cowper, not approved of by Lord Hardwicke, Ambler, 38. Rejected, *Ibid.* 39. not mentioned in Ambler, *sed vid.* Adams & Meyrick, *supra*.

(*y*) Webb *v.* Jones. 2 Bro. Ca. Chan. 60. S. L. Donne *v.* Lewis, 2 Bro. Rep. Chan. 257.

payment of debts. That here there was only a direction *in transitu*, and the words did not necessarily imply, that the personalty was to be exempted. But Sir *Lloyd Kenyon*, then Master of the Rolls, held, that the intention to exonerate the personal estate was clear; he said, he laid no great stress upon words, but he must lay some upon the words, “when sold, the money to be applied to the payment of mortgages, and all other debts;” and his Honor farther observed, that the testator had directed the residue to be added to the personal estate; but according to the construction contended for, that could not be done: he declared, that the money arising from the sale was to be applied to the payment of debts, in exoneration of the personal estate.

So, where *C* devised a manor to trustees in trust to sell (z), and directed the monies, to be raised thereby, to be paid in discharge of all his debts, and after payment thereof, in the first place, to invest the residue, and pay the interest to his wife for life, and the principal, after her decease, to his nephew; and after his several specific and peculiar legacies, gave to his wife

(z) 1776. *Holliday v. Bowman*, cited 1 Bro. Rep. Ch. 145.

all his goods and chattels, and appointed her executrix: it was held, that the personalty was exempted from the debts and legacies, but was subject to the funeral expences; and it was decreed accordingly.

Although the mortgagor devise the estate subject to the incumbrances, which are upon it at the time of his decease, yet if, from other circumstances, there be ground to infer, that the testator did not thereby intend to exempt the personal estate from exonerating the real estate, that fund will notwithstanding be first liable to the charge.

Thus (*a*), when one seised in fee of a manor and lands near *G*, in *S*, that were in mortgage, and likewise seised in fee of other lands, begun his will by “directing that his executor should “pay and discharge *ALL his* just debts, and “that he should raise sufficient to pay the “fame, and then devised his manor, &c. at *G*, “to *IS* at the age of 21 or marriage, subject “nevertheless to the incumbrances, that were, “or should be, upon it at the time of his de-

(*a*) Searle *v. St. Eloy*, 2 P. Will. 386. *et vid.* Astley *v. Earl of Tankerville*, 3 Bro. Rep. Chan. 548.

" cease, and in the mean time, and until *J S*
" should arrive at her said age or marriage, the
" rents, issues, and profits, to be paid by his
" executor, into the hands of her father and
" mother, which ever should be living at the
" time of the testator's decease, for the plain-
" tiff's sole benefit and advantage, and then
" devised to his brother *L C*; and his heirs, the
" reversion of the manor of *W*, (after the death
" of *M F*) subject nevertheless to the payment
" of such of his debts as should remain unpaid.
" And all the rest of his real and personal estate,
" not therein before specifically disposed of, he
" devised to *J S E*, his heirs and assigns, in
" trust to sell and dispose of the same, as soon
" as conveniently might be after his decease,
" and thereout to pay his debts and general le-
" gacies; and in case there should be any de-
" ficiency, and that any of his debts and lega-
" cies should remain unpaid, then he charged
" the same on the reversion and inheritance of
" the manor of *W*, and thereby directed the
" said *L C*, and his heirs, to pay off the same
" within six months after the death of *M T*,
" and he made the said *J S E* sole executor."

At the time of the testator's death, the manor,
&c. at *G* in *S*, remained in mortgage to one *H*
for 500*l.* and the question on a bill filed in

chancery,

chancery, was, whether this mortgage debt of 500*l.* should be discharged by the executors and trustees of the testator, or should be left upon the estate devised : and his Honour decreed, that *all* the debts and general legacies of the testator, were by his will to be paid out of his personal estate, and the real estates devised to the defendants *I S, E, and C,* and that the mortgage of *H,* on the estate devised to *I S,* was to be taken as one of those debts. And this decree was affirmed on appeal to *Lord King.*

The circumstance from whence the Court seemed to have concluded in the above case, that the testator had no intentions to exempt his personal estate from exonerating the real, by devising it, subject to the incumbrances thereupon, appears to have been, that the devise of the other lands was to pay *all his debts;* which word *all* is omitted by *Peer Williams* in his report of the case, although it appears on the record of the proceedings.

Accordingly, Lord *Thurlow*, in the case of the *Duke of Lancaster* against *Mayer* (b), observes “ that the case of *Searle and St. Eloy,*

(b) 1 Brow. Rep. Chan. 461.

went

went upon the idea of the charge upon the real estate being the *debt* of the testator." But his Lordship observes, "that if that case were recent, and had not been followed, he should have thought upon the face of it, it was very open to argument."

And in the case of the *Duke of Ancaſter and Mayer*, Lord *Thurlow* distinguished the case of a *charge subsisting*, from that of a debt, contracted under such circumstances of a devise to pay debts; holding, that where there was a charge inherent in the estate, and prior to the devisor's title, neither his personal nor real estate, devised to pay such testator's debts, should be thereby charged with such incumbrance.

Two cases have lately occurred upon this subject, in which his Honour, the present Master of the Rolls, has fully considered the authorities upon the subject, and drawn such conclusions from them, as place the principle in a clear point of view.

In the case of *Burton v. Knowlton* (c), A devised all her freehold, copyhold, and leasehold,

(c) 3 Vez. Jun. 107.

messuages, &c. and all his real estate to two trustees, upon trust after her death, with all convenient speed to sell, &c. all, or any part of, her real estate; and, with the money arising from the sale, to pay off and discharge all the mortgages and incumbrances in any wise affecting the real estate, and also all other her just debts and *funeral expences*; and to lay out the surplus in stock, and to pay and apply the clear rents and profits of her real estate, or so much as should not be sold, and the clear annual income and produce of the money arising from the sale, after payment of the debts, for the benefit of her friend *B* for life, and after his decease to convey, apply, and dispose, of all such parts of her real estate, and the produce thereof, not sold or applied, to the heirs or heir at law of her cousin *C*. The testator then gave her family pictures, &c. to her heir at law. She gave several legacies to several persons, and 50*l.* to each of her two trustees, over and above a reasonable recompence for their trouble, which she directed them to retain out of the trust premises: then, after giving several other legacies, she gave 200*l.* to be paid by the said trustees, after the decease of *B*, to such person and persons, and in such manner and form as he should, by any deed or writing under his hand,

hand, appoint. All the rest and residue of her personal estate and effects whatsoever, not before specifically disposed of, she gave and bequeathed to the said *B*, his executors and administrators, upon trust to pay, apply, and dispose of the same, to such person and persons, and in such shares as she should, by any writing to be executed by her, appoint; and for default of appointment, she gave the residue to the said *B* for his own use and benefit, and she then appointed him executor.

The testatrix died without having made any appointment. The only question was, whether the estate not specifically disposed of, or the real estate, should be first applied in discharging the debts.

Et per Master of the Rolls. This is one of those cases that come so often before the Court, and which have given rise to such difference of opinion upon the bench, that it cannot be wondered that I have taken so much time, both in this and in the case of *Brummel v. Prothero*, the next cause that stands for judgment, and upon which I confess, if the consideration of the one did not involve that of the other, I should not have taken so much time;

time; however, upon full consideration of the will, and fully subscribing to the principles that swayed the Court in the Duke of *Ancaſter v. Mayer*(d), I am perfectly satisfied, this testatrix did intend to give her personal estate to *B*, exempted from the payment of debts. The cases are very numerous, and great judges have differed upon them: some have thought the words sufficient to exempt the personal estate; others have thought they did not afford that demonstration. I shall not go into the circumstances of the cases. There are certainly many ingredients in this, that seem to have been relied upon by judges, who have thought the personal estate not exempt. The circumstance that the trustees are not the executors, affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate; and I desire to have it understood, that though the words, “*funeral expences*,” comprised in this trust, occur in some of the cases, and are held not to have any considerable weight, yet that is where the trust fund is given to the executors, to whom the personal estate is afterwards given; and I cannot but think, that where the trust fund is given, with such general words to trustees, who are

(d) *Supra.*

not

not the executors, upon whom the *funeral expences* would naturally fall, it does afford a considerable argument, that the testatrix did not mean the personal estate to be the fund for all those charges that naturally fall upon it. The subsequent words of the residuary clause convince me, that she did not mean to give it to him as executor, but as a specific legacy, and exempt from the debts; for so far from being given to him as executor, and his being entitled to it as such, it is given to him upon trust, to dispose of it according to her appointment, and for default of appointment for his own use, and then she makes him executor.

I need not state the principles which have been so often commented upon, in the Duke of *Ancaſter v. Mayer*; that unless there are words, not express, but tantamount to express, so as to afford demonstration plain, that the personal estate is intended to be given as a specific legacy, and exempt from the payment of debts, it shall be taken subject to them. Great stress was laid in the argument on the word “residue,” and it was said, in the Duke of *Ancaſter v. Mayer*(e), the Court laid great stress upon that word. I think, in that case, a great deal

(e) *Supra.*

of

of argument did arise from that word, as there applied; but I cannot read this will without giving to the words, "rest and residue," a meaning totally distinct from residue, after payment of debts; for these words, coupled with the words "not specifically bequeathed," mean only such parts of the personal estate as are not specifically given, which alludes to what she had before given to the heir, or to the leasehold estates given to the trustees. There are so many shades of difference between the Duke of *Ancaſter v. Mayer* (*f*), and this case, that a thousand arguments might arise in that, that do not arise in this; and when I read *Walker v. Jackson* (*g*), before Lord *Hardwicke*, who certainly differed from Lord *Talbot*; and when I read Lord *Thurlow's* judgment in the Duke of *Ancaſter v. Mayer*, I cannot think the word "residue" bears, upon this case, as it did on that, for there the trustees were likewise executors. The testator gave all his personal estate to the person entitled to the rents and profits of his real estate: It is not given as a residue, as here; but all his personal estate so given, he himself afterwards calls by the name of residue; and then, upon which Lord *Thurlow* very justly laid the greatest stress, and

(*f*) *Supra.*

(*g*) *Vid. supra.*

which,

which, I think, put it out of the power of the Court to exempt the personal estate, he nominates the same persons executors of his will, who were trustees for the payment of the debts; and directs them to discharge his funeral charges, and all his debts and legacies, as soon as they should become due and payable, as counsel should advise, and to satisfy themselves out of his personal estate, or the trust fund; all disbursements, expences, and charges, they should be put to in proving, or in the execution of the will. Lord *Thurlow* thought it too much to say upon such a gift, the trustees holding both funds, and having an option to pay out of both promiscuously, that the personal estate was intended to be exempt. Great doubts were entertained upon that case at the time, but I most heartily subscribe to it. But Lord *Thurlow* there says, what has imposed a most grievous task upon the Court; that it is too late to say express words are necessary. There are many cases determined in favour of the personal estate, which I should have had great difficulty to acquiesce in; *Adams v. Meyrick* (*h*), is a very weak case. In *Stapleton v. Colville* (*i*), the circumstance laid hold of by Lord *Talbot* does not satisfy my mind, nor does it seem to have

(b) *Supra.*(i) *Supra.*

satisfied

satisfied Lord *Hardwicke*, and Lord *Thurlow*, viz. the mere circumstance of the executor having a power to raise so much out of the term as would be sufficient for the debts. I have felt great anxiety and difficulty for fear of drawing so nice a line, that judges can hardly tell how to guide themselves in determinations of this sort. I have looked very carefully at *Walker v. Jackson* (*k*), and it must be remembered that Lord *Hardwicke*, who determined that case, thought the words not sufficient in Lord *Inchiquin v. O'Brien* (*l*): in the former he considered all the cases. In applying that case to this I am perfectly satisfied, that if he was right in the consequence he drew in that case, I am warranted in that which I have drawn in this. It was upon the codicil that Lord *Hardwicke's* opinion turned, as affording a presumption for the exemption of the personal estate; but if the report is right, he did not rest merely upon its being by way of codicil, but thought, that if it had been in the will, it would be a strong case for the exemption of the personal estate; so I think, for the codicil is only part of the will, and it is to be taken altogether. This testatrix having given this

(*k*) *Supra.*

(*l*) *Supra.*

3 M

fund

fund in the largest words to pay all mortgages and incumbrances, and all other debts, and even her *funeral expences*, to persons who are not then naturally to pay them, gives the rest and residue, not before specifically bequeathed to the person whom she makes executor; but not as executor, for she had an intention of appointing it, and then in default of appointment, she gives it to him for his own use. Compare these words with *Walker v. Jackson*. I think I am perfectly warranted in saying, there is demonstration plain, that she did not mean to give it to him as executor, but specifically for his own use and benefit, and exempt from the payment of debts. I have had great difficulty, and am much afraid of breaking in upon established rules, which I never desire to do. There is a case which is not reported, and was suggested by me, and deserves some account, to shew, that the principles of it are not broken in upon: it is *Gaskill v. Hough*, Feb. 1774, in which I was counsel. The court thought the personal estate exempted. That depended upon very different principles; it was neither a charge for debts, nor a devise for payment of debts, for I am not one of those judges who think there is much difference, whether it is the one or the other, unless there is demonstration

stration that the personal estate is intended to be exempted : that case was not a charge upon the real estate, but an express direction and declaration, that the debts, funeral expences, and charges, of probate, should be paid out of the real estate, and the testator then gave his personal estate to his wife, except a leasehold estate in *Stockport*, which he gave to another: the heir was an infant. The Court has never gone the length of saying, that in such a case the real estate is not particularly appropriated; and from that very appropriation the personal estate is exempt. Fully acquiescing in the Duke of *Ancaſter v. Mayer*, I am perfectly satisfied, that I am warranted in holding, that this personal estate is given to *B* exempt from the payment of debts.

In *Brummel v. Prothero* (m) *A* devised all his manors, &c. with their and every of their appurtenances, unto *B* and to his heirs in trust; in the first place, to the use, intent, and purpose, that his mother *C* should pay all his just debts, and also to and for the use, intent, and purpose, that his mother and her assigns should, after his decease, receive, out of all and every his manors, &c. an annuity or rent charge of

(m) 3 Vez. Jun. 111.

3 M 2

120L.

120*l.* and to and for this further use, intent, and purpose, that his four sisters of the half blood then living, and their assigns, should, from and immediately after the decease of the survivor of him and his mother, during their respective natural lives, have, receive, and take, out of all and every the said manors, &c. an annuity or rent charge of 200*l.* in equal shares and proportions, with powers of distress and entry; and as to, for, and concerning, all and every the said manors, &c. from and immediately after his decease, charged and chargeable as aforesaid, to the use of his brother *D* and his issue in strict settlement, remainder to the use of his half brothers *E* and *F*, and their issue, successively, in the same manner, remainder to the use of his said sisters, and their heirs, as tenants in common; and he directed his said brothers of the half blood, and their issue, when in possession, to take the name of *A*; lastly he gave and bequeathed unto his said brother *D* all his monies, goods, chattels, rights, credits, personal estate and effects, whatsoever and wheresoever, and he appointed his said brother sole executor.

The bill was filed by bond creditors, and the question was, whether the real or the personal estate

estate should be first applied in the discharge of the debts.

Master of the Rolls. I shall not determine it now; I will look at the will very carefully; but I will state the principles that will guide my determination. First, I will not look out of the will as to the state of his affairs; I shall not be guided by the consideration, whether he could or could not, under certain circumstances, have intended what might or might not have been inferred from the same will under other circumstances. Secondly, as to the irresistible inference, I do not know what is meant by that: I admit it must be such an inference, as leaves no doubt upon the mind of the person who is to decide upon it: it must be irresistible to my mind: it need not be such, that no man alive can doubt it: but it must not be a case of presumption; for then we shall get into the miserable way of explaining it by evidence: it is not like the case between the executor and the next of kin, where the residue is not disposed of, which, I say, is only whether the testator did or did not, upon the whole, intend, at the time, that the executor should take it: that may be explained by evidence; this cannot; but must stand upon the

will. There are, I am sure, cases upon these words "I will that all my just debts shall be paid out of my real estate" that, I take it, was determined to lay it upon the real estate only. There was a case of *Gaskill v. Hough*, in the exchequer, in which the words were something like these. This is a case which cannot very unfrequently have happened. I must be perfectly satisfied, before I decide, that the personal estate is exempted. In the Duke of *Ancaſter v. Mayer* the Lords Commissioners were satisfied, Lord *Thurlow* was not; and he said, nothing but absolute satisfaction should induce him to exempt the personal estate. Irrefutable inference is not necessary even in the case of an heir at law. In the known case of a devise to the heir, after the death of the wife, the inference is not irrefutable; if it is to a stranger, there is no inference.

On a subsequent day his Honour said, my determination in this case is directly the reverse of the last; for I am clearly of opinion, it is not sufficient to exempt the personal estate from the debts. I have looked very attentively at the will, that the party should not think it a hard determination, because different from the last. There is a very wide difference between

tween the two cases. This is stripped of every circumstance, except that of a devise to a trustee for the payment of debts, and a general bequest of the personal estate to the executor. There is no one case since *French v. Chichester* (*n*), the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has been over and over again decided, that such words are not sufficient to raise such a demonstration as Lord *Thurlow* says is necessary.

A real estate descended, shall exonerate a real estate encumbered. This is a question as to marshalling assets, and generally resolves itself into a question of intention, either express or implied.

The first case we meet with of this kind is that of *Galton and Hancock* (*o*). There the defendant's late husband, being seised in fee of an estate, and having borrowed a sum of money, gave a bond for it, dated *May 12, 1724*, and a mortgage for the same sum, on the 13th of *June* following; and on the 11th *December*,

(*n*) *Supra.*

(*o*) *Galton v. Hancock*, 2 Atk. 424. *vid S. C. Ridgway's Rep.* 301.

1728, made his will, by which he devised the estate in fee, which he had thus mortgaged, and also an estate for three lives, to the defendant his wife, and made her sole executrix.—In 1734, the testator *purchased* one moiety of the reversion in fee of the *life-hold estate*, and the other moiety in 1737, and died soon after without making any alteration in his will.

A bill was brought by the heir at law (*p*), to have the deeds and writings of the leasehold estate, the reversion in fee of which was purchased by the testator, *after* making his will, and for an account of the personal estate; the heir insisting, that the estate descended was not liable to pay the mortgage, and endeavouring to throw the burden upon the defendant, to be discharged out of the personal assets, and if those should be deficient, out of the estate devised to her. For the wife, it was argued, that if the personal estate was not sufficient to pay the mortgage, the estate, descended upon the heir, should make up the deficiency, and the estate devised to the wife should not be affected, while the real assets were sufficient.

On the first hearing of the cause, Lord *Hardwicke* observed (*q*), that it having been admit-

(*p*) *Galton v. Hancock*, 2 Atk. 424. *vid. S. C. Ridgway's Rep.* 301.

(*q*) *Ibid.*

ted,

ted, that the purchasing the reversion, after making the will, was clearly a revocation, *pro tanto*, the main question was, whether, where a real estate was devised with an incumbrance, and another descended upon the heir, the devisee was entitled to have the estate exonerated?

His Lordship was of opinion, that the devisee was not so entitled in a court of equity (*r*).

No precedent had been cited to him where it had been so determined, or where the very point had come directly before the court (*s*).

This was a case where the testator himself had laid a real burden on the lands devised (*t*), and quite different from the case of a general bond-debt, to the payment of which the personal estate should be applied first. The mortgaging it was a material circumstance, for how could a court of equity say that the testator did not intend it should pass, *cum onere*, when there was so strong a presumption that he did? that an heir at law, who had an estate descended upon him, was to be considered in the same

(*r*) Galton *v.* Hancock, 2 Atk. 424. *vid.* S. C. Ridgway's Rep. 301. (*s*) *Ibid.* (*t*) *Ibid.*

light

light as if the estate had been actually given to him ; and there was no colour to say (even laying aside the expression of an heir at law being a favourite of a court of equity) that a devisee should be preferred to him in equity.

But, upon a rehearing, his Lordship changed his opinion, on the grounds that, before the statute of fraudulent devises, which gave a remedy to specialty creditors against devisees, the remedy was against the heir only ; at common law the devisee was not liable to the demand, because the descent was broke ; and the rule of equity, before the statute, did not differ from the rule of law, unless there was some particular circumstances in the case ; that the statute made no difference, as between the heir and devisee, the fraud provided for thereby, being only, such as went to defeat the creditors, and no favour was thereby intended to heirs at law. The enacting clause made wills void against such creditors, but left the law as it was before, as to heirs. Then, as in case, before the statute, there had been a general debt by bond or covenant, wherein the heir had been bound, without any mortgage to secure it, the heir must have discharged it, and could have had no contribution from the devisee ; so, since the statute, satisfaction

satisfaction should be first made out of assets descended upon the heir at law, and if that should prove deficient, but not otherwise, then the devised estate should be liable. That there being a mortgage, would make no difference; for a mortgage was a debt by specialty, and the land only regarded as a pledge or security for the money. That on the same principle, which induced the court to direct the personal estate to be applied in payment of specialty debts, in favour of the heir, it raised an equal equity in favour of a devisee, circumstanced as in the present case. By the will, the land was given to the wife, but the mortgagee might take his remedy against the devisee, or the heir, at his election; but as in a case between the heir and the executor, the election of the creditor would not determine which ought properly to be charged, or vary the right as to the funds, so neither could determine, as between the heir and the devisee; but the devisee would be entitled to stand in the place of the creditor, in this case, as the heir would stand in the place of the creditor in the other, and to be exonerated by him for what he had disbursed. Then the court would not put the parties to this circuity, but give the devisee the benefit directly against the heir at law.

But

But another point was raised in the case of *Galton* and *Hancock*, between the heir and devisee, where there was a general charge of debts. And the answer of Lord *Hardwicke* to the argument on the effect of *such general charge*, laid the foundation for farther distinctions, which have been taken up and established in subsequent cases. His Lordship considered *such general charge*, as *affording no ulterior inference beyond that in favour of creditors*.

It was speedily discovered, that, if this conclusion of Lord *Hardwicke*, upon the circumstance of a general charge, was well founded, it would necessarily follow, that where a testator made such a general charge, and, subject thereto, devised the whole of his estates from the heir, and afterwards acquired other estates, which he permitted to descend, the descended estates would be first liable, notwithstanding the charge; and this is also a point necessarily implicated in the general point decided, in the case alluded to; for on this ground, such charge makes no difference, as between the heir and devisee, but only improves the condition of the creditors, by giving them a particular specific fund, to which they may resort in the first instance, but it leaves the question, as to who shall

shall ultimately bear the burden, open; and then equity steps in, and fixes it upon the heir, as having in relation to the testator a permission, not a positive benefit, and therefore having a weaker equity.

The case of *Wride* and *Clarke* turned upon this principle (*u*). There C died, seised of several real estates, and possessed of personal estate, having made his will, and thereby directed, that all his just debts should be paid, and charged all his estate, real and personal, with the payment of the same, and subject thereto, he devised all his real estate to his wife in fee, and appointed her sole executrix. The testator purchased additional estates, between the time of making his will and his death, which descended to his heir at law. The debts of the testator exceeded the value of his personal estate, and, on a bill filed by the creditors, the question was, which estate should be first applied, the estate descended, or the estate devised? and it was decreed at the Rolls, that after application of the personal fund, the descended estate should be applied, previous to the devised estate in satisfaction of the debts.

(u) Cited 2 Bro. Rep. Ch. 261.

So, where *T* seised in fee of considerable real estates (v), subject to a mortgage to *P*, made his will, and thereby, as to his worldly estate, either real or personal, after payment of his debts and funeral expences, gave and disposed thereof in manner following: He gave to his sister *L*, an annuity for her life, to be paid to her by the person or persons, who, for the time being, should be seised of his real estates under his will, and he also gave several pecuniary legacies, and he charged and made chargeable all his real and personal estates (except part of his personality given as heir-looms) with the payment of his debts and legacies aforesaid; and, subject thereto, he devised all his manors of *W* and *V*, and all his real estates in the counties of *S* and *M* (which were all the real estates he had at the time of making his will) to his nephew *R L* for life, on his obtaining the King's licence to bear his name and arms, remainder to his first and other sons, in strict settlement, remainder over; and he gave several articles of personal estate, to be enjoyed as heir-looms by the devisees of his real estate, and as to all the rest of his personal estate, subject to the payment of his debts, legacies, and funeral ex-

(v) Davies v. Topp, 2 Bro. Ch. Rep. 524.

pences,

pences, he gave the same to his nephew *R L*, and appointed him executor to his will. After making his will, the testator purchased a freehold estate at *V*. A bill was brought for an account, and application of the personal estate in payment of debts and legacies, and in case the personal estate should not be sufficient, then to establish the will, and to have the deficiency raised by sale or mortgage of a competent part of the real estate. And an account was directed, and the personal estate, not specifically bequeathed, was ordered to be applied in payment of the debts, legacies, and funeral expences, in a course of administration; but in case such personal estate should not be sufficient for the payment of the testator's debts, his Honor declared, that the deficiency, as to what should be remaining due to the mortgagee, and the other specialty creditors, ought to be raised by sale or mortgage of the real estate, descended to the heirs at law; and the real estates devised by the will, were not directed to be applied to the payment of the testator's debts and legacies, until all the other funds were exhausted; and this decree was affirmed on appeal to the Chancellor.

But,

But, where there was a *particular* charge for the payment of debts; as where a testator, being in possession of two estates, devised one, charged with a term for that purpose, the devised estate was held to be first liable.

Thus, where an estate was made subject to a five hundred years term, by the owner's will (*x*), for the payment of debts, and other lands descended, Lord *Hardwicke* held, that the estate so subjected must first be applied, before the creditors could come upon the estate descended on the heir at law: his Lordship observing, that if a testator has created a particular trust out of particular lands, and subjected to that trust, devised it over, the devisee can take no benefit but of the remainder, after the whole burden upon it discharged; and as to that, the heir at law stood in a better place than the devisee did.

And I presume the same inference would follow, if a person seised of three or four estates, devised one estate *specifically* for the particular purpose of paying his debts; that estate would

(*x*) Powis *v.* Corbett, *alias* Corbett *v.* Kynaston, 3 Atk. 556.

be first applied, even in favour of the heir; for these are questions of intention. Then, "what is the inference furnished by the circumstances in these cases? It is this: Where a testator gives the whole of his estate, at the time of the devise, subject to a general charge, he means to give the devisee all that can be saved of his affairs, after payment of his debts. If he afterwards becomes possessed of an estate by devise or purchase, thus much is clear, by charging his estate with payment of his debts, it could not be in his contemplation to charge an estate, which he actually gave, in favour of an estate which he had not. In such case, the estate descended cannot be stated as the object of his intention to exempt. But if a testator has two estates when he makes his will, and charges one, either generally, or by creating a term thereout, the inference is, that he means to exempt the other."

The case of *Donne* and *Lewis* is another instance (*y*), shewing, that whether the intention was to charge the estate specially or generally; that is, whether the testator has selected any part of his estates which by his will should be first

(y) 2 Bro. Rep. Chan. 257.

3 N applied,

applied, or whether the charge is only to subject his estates to the payment of his debts, which otherwise perhaps could not be applicable to them; is the main question on such occasions.

In that case, *L* made his will (z), and thereby desired, that, all his just debts, funeral expences, and the charge of proving his will, might be paid as soon as convenient after his decease, and gave and bequeathed to his wife *S L* the sum of 200*l.* and also several specific parts of his personal estate. He then devised to the said *S L*, and to *T L*, and *I B*, and to the survivor of them, and the heirs, executors, and administrators of such survivor, according to their respective estates and interests therein, all his freehold, copyhold, and leasehold estates (not thereafter particularly bequeathed) together with all his ready money, and book-debts, which should be due and owing to him at the time of his decease, in or upon account of his several trades or employments of a builder and feather-merchant, upon trust, that they the said *S L*, *T L*, and *I B*, &c. should collect and receive the said book-debts, and sell and dispose

(z) *Donne v. Lewis*, 2 Bro. Rep. Ch. 257. *et vid.* *Manning v. Spooner*, 3 Vez. jun. 114.

of his freehold, copyhold, and leasehold estates, *and out of the money arising thereby, pay and discharge all his debts and legacies whatsoever* (except the debts secured by mortgage of the estates thereinafter specifically bequeathed, which were to be paid and discharged by the devisees of those estates respectively) and in case the money so to be raised by his said trustees, should not be sufficient to discharge the said debts and legacies, then he willed, *that the deficiency should be charged on the several estates thereinafter given, or bequeathed to or for the use of his three sons and two daughters respectively, and that one-fifth part of such deficiency, with interest thereon, at five per cent.* from the time of his decease, should be paid by each of his said sons and daughters. He then proceeded to devise very fully and particularly to, or in trust for, his five children, respectively, five several estates; four of which were leasehold, the other freehold, and three of the leasehold estates were subject to mortgages or other incumbrances; but in case it should be necessary to pay off and discharge the mortgages, or other incumbrances upon any parts of his estates before the trusts thereby created, concerning such estates respectively, should be fully executed and determined,

the said testator thereby empowered and directed his said trustees, and the survivor of them, &c. as the case might require, to sell and dispose of such respective estates, in the best manner they were able, and after payment of all charges, incumbrances, and expences thereon, lay out and invest the residue of the money to arise by such sale, in the purchase of government securities, in the names or name of his said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, as the case might require, to and upon the like uses and trusts as were thereby expressed and declared, of and concerning such estates respectively, or to such of the said uses and trusts as should be then existing and capable of taking effect. And the said testator gave all the rest and residue of his estates, real and personal, of what nature, kind, or quality soever, unto and among all and every his three sons and two daughters, in equal proportions, share and share alike; and the said testator made the said *S L, T L, and I B*, executors of his will.

A bill was filed to have the trusts of this will performed, and for the necessary accounts. The Master made his report, by which it appeared,
that

that the general personal estate, together with the trust fund, consisting of the leasehold premises, not specifically bequeathed (for in fact, the testator had no copyhold estates whatsoever, and no freeholds, but those specifically devised) and the ready money and book-debts were not nearly sufficient to pay the debts, which amounted to upwards of 5000*l.* besides those specifically charged on the devised estates, and that the legacies amounted to 2000*l.* It also appeared, that *the testator purchased a small freehold estate, after the time of making his will,* which was worth about 300*l.* and which therefore descended on his eldest son and heir at law.

The single question was, whether the descended estate should be applied in payment of the debts and legacies (there being specialty debts, in fact much beyond the amount) in preference to the trust fund devised for that purpose, or before the specific devisees should be called upon for their contribution according to the directions of the will?

Et per Lord Thurlow (a), the question will always be this, and the only one that can re-

(a) *Et vid. Manning v. Spooner,* 3 Vez. Jun. 114.

concile all the cases: Are the terms of the will only a general indication, that the testator *means* to subject his property to his debts, and not to be a knave (as many of the cases treat the man who does not) or does he mean more, and to make a particular provision for the purpose? It is unnecessary to enlarge on the point of the mortgage debts, for he has provided for the payment of them in so distinct a manner, that even the case of *Serle* and *St. Eloy*, could never touch this case (*b*). They are clear deductions from the property devised. But the question arises more on the general provision for debts. There are two provisions, consisting of his ready money and book-debts, and also some leasehold estates, which very probably were an enumeration of all his personal estate not otherwise specifically disposed of; the next was a contribution from the devisees. The supposed intention to be imputed to the testator, is, that he means to exempt *Whiteacre*, where he charges *Blackacre*; but this cannot be applicable to *Greenacre*, which he had not until afterwards. But the fallacy is, that there is no intention in fact, either as to *Whiteacre* or *Greenacre*, but only as to *Blackacre*; and he leaves both the others quite clear of his inten-

(*b*) *Supra.*

tion,

tion, which does not apply at all more to *Greenacre* than to *Whiteacre*, he being totally silent as to both. And you must execute his intention as to *Blackacre*; and if *Blackacre* is not sufficient, the justice of the case will be executed as to creditors, notwithstanding his intention, and only under the common principles of law. Therefore, the legacies would not be charged on the descended estate directly, but it must be done, if at all, by circuity. In this point of view then, is there, in this will, such an expression of intention, with regard to the devised estates, as to affect a property, which the will takes no manner of notice of, or is it a direction how, and *out of what funds*, the debts and legacies shall be paid? He directs *all the trust fund to be converted into money, and to be applied, &c.* and he gives interest at five pounds *per cent.* on the legacies from his death, which is beyond the ordinary course of this Court, and the intention usually imputed to testators. Having charged these estates *specially*, it is impossible to execute this purpose without, by consequence, exempting the estate descended. In this view, I take it to be consistent with the cases of *Davies* and *Topp*, *Wride* and *Clark* (c), *Corbett* and *Kynaston*

(c) *Supra.*

3 N 4

Powis

Powis and *Corbett* (*d*) and *Galton* and *Hancock* (*e*) (though there was a difference in those cases as to the consequence of those principles) to say, that the trust fund must be first applied, and if that is deficient, as it appears to be, then, that the devisees must contribute in fifths, before the estate descended can be called upon.

On the whole, therefore, the rule, as to the order of affecting assets in such cases, is this (*f*): First, that the general personal estate is to be applied. Secondly, ordinarily speaking, estates devised for payment of debts. Thirdly, estates descended. Fourthly, estates specifically devised, even though they are *generally* charged with the payment of debts.

And if one purchase an estate subject to a mortgage, his personal estate will not be liable to exonerate the real estate from payment of the mortgage debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all costs and charges in respect of it.

Thus, where *B* agreed to purchase an estate of *A*, which was then subject to a mortgage

(*d*) *Supra*.

(*e*) *Supra*.

(*f*) *Per Lord Thurlow*, 2 Brow. Rep. Chan. 263.

of 2000*l.* to *D* (*g*), and accordingly by indenture of lease and release between *A* of the one part, and *B* of the other part, reciting the mortgage, and that *B* had contracted with *A* for the purchase of the inheritance of the said estate, and had agreed to pay the sum of 3500*l.* for the same in manner therein mentioned, that was to say, to the mortgagee all such sums as should be due to him upon the said mortgage, on the first of *May* next ensuing, as also to pay such sum of money as should remain after deducting the money due on the mortgage to *D*; it was witnessed that the said *A*, in consideration thereof, did grant, &c. to the said *B*, his heirs and assigns for ever, all the said premises, &c. and in the covenant against incumbrances, the mortgage and securities were excepted. And the said *B* did covenant, that he, &c. would well and truly pay, or cause to be paid, to the said *D*, the said sum due in manner aforesaid, and would indemnify the said *A*, his heirs, &c. and his goods and chattels, land and tenements, from all costs and charges, &c. in respect of the said mortgage. *B*, after completing the purchase of *A*, made his will, and died, and then a question arose between his personal representa-

(*g*) *Tweddle v. Tweddle*, 2 Brown's Ch. Rep. p. 101.
152.

tives,

tives, and the devisees of this estate under the will, whether, from the nature of the contract, the personal estate of *B* (respecting which he had made no disposition in his will) was liable to be applied in discharge of the mortgage? *Et per Curiam*, it is a clear rule that the personal estate is never charged *in equity* where it is not at law; and if not chargeable at law, there is no principle or case in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims (*h*). In respect of the rule of marshalling assets, it is that it must be a debt affecting both the real and personal estate; so in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove that the executors are accountable at law, and not in equity. In this case, the personal estate never was liable, either by action against the party himself, or against his executors (*i*).

(*b*) *Vid. Clarke v. Sampson*, 1 Vez. 100. et 2 Vez. Jun. 65.

(*i*) *Vid. Wood v. Huntingford*, *infra* et note distinction.

And if money on mortgage be *not* properly the debt of the owner of the mortgaged estate, that estate alone shall bear the burthen thereof, notwithstanding that *the owner*, by his will, *charges a specific part of his property* with the payment of debts.

Thus (*k*), where a leasehold estate had been mortgaged by the testator's father to *N*, for 6*500l.* and had, subject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was assigned by the desire of the testator to *H*, who advanced him a farther sum of 1*00l.* upon it, and the testator conveyed other estates as an additional security to the mortgagee. The testator then made his will, and thereby devised as follows: "I give and devise to *A* and *B*, their executors, administrators and assigns, all those my manors, lands, &c. in *L*, to have and to hold to them, from the time of my decease, for the term of 99 years, upon the trusts herein after mentioned." He then gave the real estate subject to the term, and, in default of issue of his own body, to the plaintiff for life, remainder to his first and other sons, in strict settlement, with re-

(*k*) *Ancaister v. Mayer*, 1 Brown's Ch. Ca. 454.

mainders over, and afterwards declared as follows: "I do hereby declare, that the term and estate, so as aforesaid limited to them the said *A* and *B*, &c. is upon the special trust and confidence, and to the intents and purposes following; that is to say, upon trust, that they the said *A* and *B*, &c. shall, out of the rents and profits, or by mortgage, assignment or demise, of all or any part of my before-mentioned manors, &c. or any of them, for all or any part of the said term of 99 years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient *to pay and satisfy all the debts I shall owe at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs, &c. the said term shall cease and determine." He then devised as follows: "I give and devise to my brother *M B*, his executors and administrators, all that the manor of *East and West Deeping*, holden by lease from the crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon to *N*, for 6500*l.*;

6500l.; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations of this my will." And towards the end of his will he devised as follows: " *Item*, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever, unto my said brother *M B*, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will," &c. *M B* died in the lifetime of the testator, and the plaintiff became entitled under the limitations in the will to the real estate. And one question was, whether the term bequeathed by the testator for payment of debts was liable to discharge the mortgage-debt on the leasehold estate? *Et per Curiam*, With respect to the leasehold estate, *the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate*, and the estate itself was left liable to answer it, and neither the personal estate, nor real estate, ought

ought to be charged with that debt ; for when a man purchased an equity of redemption, *subject to incumbrances*, that should be a real incumbrance following the land, and *not a personal one*. And the difference between an estate descended and one purchased was nothing, unless the circumstance of purchasing created the difference, but *that* afforded *no* argument. The question then was, whether assigning the mortgage from *N* to *H*, and covenanting for payment of debts, altered the case, and made it the debt of the testator ? and it was clear that it did not ; for although where a man transferred a mortgage, and *covenanted* for the *payment* of the debt, according to the *rule of law*, he made it his *own* debt, and made *himself* liable to be sued upon that covenant ; yet the case of *Evelyn v. Evelyn* had decided (*I*), that though he might be at law liable, yet while there were *real assets* sufficient for the *payment* of the incumbrance, *they* should be applied for *that purpose* ; and it was to be understood, with respect to such transaction, that the party did it by way of *accommodating the charge*, and not of making the debt *his own*.

Another question in the preceding case was,

(*I*) *Infra.*

whether,

whether, when the testator mortgaged an estate of his own as an *ulterior* security, that circumstance would create a difference? and it was held that it would not; for nothing made it his debt so effectually as the covenant to pay, for it did not create the debt, but only operated as collateral to the debt (*m*). A man mortgaged his estate without covenant, yet because the money was borrowed, the mortgagee became a simple contract creditor, and in that case the mortgage was a collateral security; and if there were a *bond* or a *covenant*, then there was a *collateral* security to a *higher species*, but no higher by means of the mortgage merely; therefore having security amounted to nothing.

Again, where *L* (*n*) being feised in fee by descent of an estate at *C*, and other real estates both freehold and copyhold, by his will devised the estate at *C*, which was subject to a mortgage for 1500*l.* contracted by his ancestor, and also another estate, to be sold; and charged the same, and also his personal estate (except 300*l.* due on bond, which was originally part of his wife's fortune, and specifically bequeathed to

(*m*) *Et vid.* Hamilton v. Worley, 2 Vez. Jun. 62.

(*n*) Lawson v. Lawson, 1 Brown. Rep. Chan. 58.

her

her by the will) with his debts and legacies; and devised the residue of his real estate in trust for his brother *B* in strict settlement, subject to a charge of 100*l.* a year to his wife upon the copyhold estate; and made his wife executrix: The question was, whether, under this will, the personal estate of the testator should be applied in exoneration of the real, towards the discharge of the 1500*l.* And it was held by Lord *Thurlow* that it should not; but that the same should come out of the estate originally liable to it (*o*). And this decree was afterwards affirmed in the House of Lords.

And here we must remark, that even a personal covenant with the mortgagee, to pay mortgage-money, will not make the personal assets of the covenantor liable in equity for it, where the money was originally advanced to another person, and not to the covenantor, for the Court will always take into consideration whose debt it is, and make the personal estate benefited by the loan, liable in the first instance, and not the security.

(*o*) *Vid. 7 Bro. Par. Ca. 511.*

Thus, where Sir *Edward Bagot* (*p*) married the daughter and heir of Sir *Thomas Wagstaff*, and for raising part of Miss *Wagstaff*'s portion, Sir *Thomas* mortgaged part of his estate for 3500*l.* and then died, leaving Lady *Bagot*, his daughter and heir. Lady *Bagot* afterwards joined with her husband, Sir *Edward*, in a deed and fine, whereby she settled her estate on her husband and herself and the heirs male of the body of her husband. The mortgagee wanting his money, Sir *Edward* joined in an assignment of the mortgage, and covenanted that he or his wife, or one of them, would pay it. Then Sir *Edward* died, leaving Sir *Walter* his son by his wife; his lady afterwards married with the defendant Colonel *Oughton*, and died. And the question being, whether, by reason of the covenant from Sir *Edward Bagot* for the payment of this 3500*l.* mortgage-money, his personal estate should be liable to pay the same? It was held that this covenant by Sir *Edward* would not make his personal estate liable to go in ease of the mortgaged premises; for the debt being originally Sir *Thomas Wagstaff*'s and continuing to be so, the covenant upon transferring was only as an additional security, for

(*p*) *Bagot v. Oughton*, 1 P. Will. 347.

the satisfaction of the lender, and not intended to alter the nature of the debt.

It follows from this principle that the general covenant in mortgage-deeds, for quiet enjoyment, free from incumbrances without excepting incumbrances—does not discharge the lands from such incumbrances, so as to throw them on mortgagor's personal estate ; it merely subjects the general assets of the mortgagor to any deficiency in the security that may be occasioned by any incumbrances whatsoever, without any supposition of discharging the *lands* from such incumbrances, but merely of indemnifying the mortgagee against them.

And the law will be the same, if money be borrowed on mortgage by virtue of a power to charge an estate ; for in such case, the heir takes the land *cum onere*. Therefore, where *George Evelyn* (q), the defendant's father, and grandfather to the plaintiffs, had three sons, *John*, *George*, and the defendant *Edward Evelyn*; *George*, the father (being tenant for life, remainder to his eldest son *John*, in tail male, of part of the premises) together

(q) *Evelyn v. Evelyn*, 2 P. Will. 659. Sc. Fitzgib. 131.
Sel. Ca. Ch. 80.

with

with his eldest son *John*, on the 20th *October*, 1698, by deed and recovery, settled certain estates in strict settlement, with a power to *George*, the father, by deed or will, to charge by lease, mortgage, or otherwise, the premises limited to himself for life, with raising or paying any sum not exceeding 6000*l.* *George*, the father, in pursuance of the power, mortgaged part of the said land for 1000*l.* for the term of 1000 years. This mortgage afterwards, by mesne assignments, became vested in Sir *Thomas Pope Blunt*, with a covenant, from *George Evelyn*, the son, for payment of the mortgage-money, and, on the same assignment, Sir *Thomas*, the mortgagee, covenanted to re-assign to *George Evelyn*, the son. Afterwards *George Evelyn*, the father, died; then *John Evelyn*, the eldest son, died without issue, upon which *George*, the second son, entered upon the premises comprised in the settlement, and died, intestate, leaving the defendant, *Mary*, his widow, and three daughters. Then *Edward Evelyn* and his son (the next remainder-man in tail) instituted a suit against Mrs. *Evelyn*, the mother (afterwards married to Governor *Bohun*) being the administratrix of her former husband, *George Evelyn*, praying, that the personal estate of her late husband

should be applied towards paying off the mortgage of 1500*l.* and in exoneration of the real estate. But it was held by the Lord Chancellor, assisted by the Lord Chief Justice *Raymond*, and the Master of the Rolls, that the personal estate of the son should not be applied to pay off this mortgage, made by the father; because the charge was made by the father in pursuance of the power contained in the settlement; and as he had such power, the defendant *Edward* must be contented to take such land *cum onere*; and notwithstanding that the son did afterwards, on the assignment to Sir *Thomas Blunt*, covenant to pay the mortgage-money, yet, since the land was the original debtor, this covenant from the son would be considered *only*, as a security for the land.

The ground of these determinations is, that, in such cases, the covenant is considered in equity as a mere collateral security, not to be resorted to, unless the principal security, which is the land, fails. For the land-holder, in truth, enters into such covenant, relying upon the land enabling him to discharge it; and the money raised does not *increase* his personal estate, but is to exonerate the rest of the real estate.

estate. And therefore, in the case of the Earl and Countess of *Coventry* (*r*), where *Gilbert*, the late Earl of *Coventry*, on his marriage with the daughter of Sir *Strensham Masters*, (the Earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500*l.* *per annum*, on any wife he should marry) covenanted, in consideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwise, settle 500*l.* *per annum* on his wife for her jointure, and it being in proof, that the late Earl directed his steward to look over the rent-rolls, for a fit part of the estate to make good the jointure, and that afterwards the jointure-deed was engrossed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* should be settled, and the covenant not made good out of the *personal estate*.

And so in the case of *Edwards and Freeman* (*s*), though the wife's jointure, and the

(*r*) Countess of Coventry *v.* Earl of Coventry, 2 P. Will. 222. Sc. Strange, 596.

(*s*) Edwards *v.* Freeman, 2 P. Will. 435.

daughter's portion, were secured by articles, which were never completed by a settlement, yet those articles being to settle lands, and the covenantor leaving lands sufficient to answer them, it was decreed, that the daughter's portion should be raised out of the lands, and that the personal estate of Mr. *Freeman*, the covenantor, should not be applied in exoneration thereof. But it is to be observed, that in the latter case, particular lands were agreed to be settled, and consequently, that the covenant was a lien upon those lands.

And upon the same principle, *viz.* that the primary fund benefited, ought in conscience to exonerate the auxiliary fund, if the funds in question stand in those relative circumstances; where the real estate of one person is made surety for the personal contract of another, the personal property of the latter shall exonerate the real property of the former, as between themselves, although the creditor may resort to either fund. The cases of Lord *Huntingdon* (*t*) and the Countess of *Huntingdon*, and *Pacock* and *Lee*, stand on this ground.

(*t*) *Supra.*

A Court

A Court of Equity will do its utmost to fix the burden, where, *in conscience*, it ought to fall on all the circumstances of the case.

Thus, where Sir *John Napper's* (*u*) estate was in mortgage, and he died, leaving Sir *Theophilus* his heir, who, upon his intermarriage with Lady *Effingham*, settled a jointure upon her, and covenanted to pay his father's debts, and then died, possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of Parliament, in trust to pay his father's debt: the heir at law brought his bill against the wife, to have the personal estate of the husband, upon his covenant, applied to discharge the father's mortgages, and it was so decreed. But the reason was, because the heir had disposed of the estate so settled in trust, and then it was but just and equitable, that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law; because he was answerable for the trust estate, settled for that purpose.

Again (*x*), where *T M*, in his life-time, agreed to purchase an estate of *P*, for 1200*l.*

(*u*) *Napper v. Lady Effingham*, Fitzgib. 142, 144.

(*x*) *Pollexfen v. Moore*, 3 Atk. 272.

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but died before he had paid the whole purchase-money. *T M* by will, after giving a legacy of 800*l.* to his sister *M*, devised the estate purchased, and all his personal estate to *K*, and made him his executor. *K* committed a devasavit of the personal estate and died; and the purchased estate descended upon *B K*, his son and heir at law. *P* filed a bill in equity against the representatives of the real and personal estate of *T M* and *K*, to be paid the remainder of the purchase-money. *M*, the sister and legatee of the testator, brought her cross bill, praying, that if the remainder of the purchase-money should be paid to *P*, out of the personal estate of *T M* and *K*, that she might stand in *P*'s place, and be considered as having a lien upon the purchased estate for her legacy of 800*l.* *Et per Curiam.* The vendor of this estate, has, to be sure, a lien upon the estate he sold, for the remainder of the purchase-money; for from the time of the agreement, *T M* was a trustee, as to the money for the vendor. But this equity will not extend to a third person, but is only confined to the vendor and vendee, and if the vendor should exhaust the personal assets of *T M* and *K*, the defendant will not be entitled to stand in his place, and to come upon the purchased

purchased estate in the possession of *K's* heir. But then the heir of *K* shall not avail himself of the injustice of his father, who has wasted the assets of *T M*, which should have been applied in paying *M's* legacy. Therefore the estate, which has descended from *K*, the executor of *M*, upon *B K*, comes to him liable to the same equity, as it would have been against the father, who has misapplied the personal estate; and in order to relieve *M*, the legatee, *P* shall take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and this last fund shall be left open, that the legatee, who can at most be considered as a simple contract creditor, may have a chance of being paid out of the personal assets.

But a stranger to the original incumbrance, may make his own personal estate the primary fund for the payment of it; and whether he has done so or not, is a question of intention, on a review of all the circumstances of the transaction taken together, as they furnish ground to infer, that the person engaging, meant to become a *principal*, or to stand as a *surety* only. The following cases will illustrate both instances;

A purchased

A purchased an estate for 90*l.* which was at that time mortgaged for 86*l.* and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor (*y*) ; the Court admitted the rule of law above-mentioned, but, in this particular case, thought that, although the covenant was with the vendor only, and the vendee's personal estate not liable in that respect to the mortgagee, yet the words were sufficiently strong to shew an intention in the vendee, to make it his personal debt.

But (*z*), where *N* was, before her marriage, indebted to sundry persons, and entitled to the inheritance of lands, charged with the payment of sundry sums ; and before her marriage entered into articles, whereby the estates were to be settled to the husband for life, *sans* waste, remainder in like manner to the wife, remainder to the issue of the marriage, remainder to the wife in fee ; the marriage took effect, and the husband being pressed for payment of the wife's

(*y*) Parsons *v.* Freeman, before Lord Hardwicke, 25th Oct. 1751. *Vid. 2 P. Will.* 664, note 1.

(*z*) Lewis *v.* Nangle, before Lord Hardwicke, 7th Nov. 1752. *Vid. 2 P. Will.* 664, note 1. *Et vid. 1 Vez.* Jun. 187. This case considered by Lord Camden in Lord Kinnoul *v.* Murray, as standing upon special circumstances and not on the general principle, *Vid. supra.*

débts,

debts, and having also occasion for a farther sum of money; they borrowed 1300*l.* of the wife's sister (the original plaintiff in the cause) and secured it by mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisoies in the mortgage. Subject to this mortgage, the lands were settled to the husband for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. *N* died without issue; and the plaintiff was the devisee of the sister, who brought his bill against *N*'s husband for the payment of the mortgage money. But the Lord Chancellor held, that although part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his Lordship dismissed the bill, so far as it sought to compel the husband to exonerate the land, but directed him to keep down the interest during his life.

So, where *L* had purchased several estates, subject to mortgages, with regard to one
of

of which, he entered into a covenant to pay the mortgage money, for the purpose of indemnifying a trustee (*a*) ; and as to another, which was only part of an estate subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and indemnify each other ; Lord *Hardwicke* thought, that these covenants would not have the effect of making the mortgages personal debts of the vendee, they having been entered into for particular purposes, and declared his opinion accordingly in the decree.

But (*b*), where Sir *W O*, by his will of the 5th *February*, 1739, taking notice, that his daughter *C* was deaf and dumb, and that *JB* had taken care of her, devised certain real and personal estate to *JB*, her heirs, executors and administrators, in trust, by sale, or felling timber, to pay all his debts, and directed that *JB* should receive the rents and produce of his real and personal estate without account, during his daughter's life, she maintaining his daughter ; and after the death of his daughter, he gave all his real and personal estate

(*a*) *Forrester v. Leigh*, 23d, 25th June, 1773. *Vid. 2. P. Will. 664*, note 1.

(*b*) *Perkins v. Bayntun*, 2 P. Will. 664, note 1.

whatsoever

whatsoever to *JB* in fee, and appointed her sole executrix ; Sir *WO* died, *March*, 1740, and *JB* proved the will ; Sir *WO*, in his life-time mortgaged part of his estate, for securing 1500*l.* and interest, which remained a charge at his death. *JB* paid off 500*l.* part of this 1500*l.* and afterwards, borrowed a farther sum of 2500*l.* on mortgage of the estates, which money was, in the mortgage deed, expressly recited to have been borrowed, to enable her to discharge Sir *WO*'s debts. *JB* afterwards died, and on the disposition made by her, and those claiming under her, of the property of Sir *WO*, this cause was instituted. The cause was first heard before Lord *Bathurst*, on the 19th *February*, 1777, when the Court declared, that the sum of 1500*l.* part of the 3500*l.* was not to be considered as a debt of the said *JB*, but was to remain a charge on the real estate, and directed an account of her personal estate. By an order made on rehearing, on the 13th *August*, 1781, that part of the decree was reversed, and instead thereof, it was declared, that the said sum of 1500*l.* appearing to have been a charge made on the estate of the said Sir *WO*, in his life-time, and remaining such at his death, was to be considered as a continued lien thereon ; and that

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the subsequent charge made on the estate by the said *J B*, being expressed in the mortgage deed to have been made for the purpose aforesaid, the same, together with the 1500*l.* amounting in the whole to the sum of 3500*l.* was to be considered as remaining a charge on the said estates.

So (*c*), where *G D* mortgaged lands to *W C*, to secure payment of 5000*l.* with interest at 5 *per cent.* and by will of 22d of *May*, 1723, devised the lands to his nephew *G S*, in tail male, remainder to the plaintiff in tail male, remainder over, and died in the same month. In 1725, *G S* suffered a recovery to himself in fee. The mortgagee calling for his money, *WG* agreed to advance 5000*l.* at 4 *per cent.* on assignment of the mortgage, which accordingly by indenture of 4th of *June*, 1725, was assigned to him, with proviso for redemption on payment of the principal and interest at 4 *per cent.*; and *G S*, for himself, his heirs, executors, and administrators, covenanted with *WG*, that he, his heirs, &c. or some or one of them, would pay to *WG* the said principal and interest, in manner therein mentioned. In

(*c*) *Shafto v. Shafto*, before Lord Thurlow, February 1786, 2 P. Will. 664, n. 1.

1779, *G S* agreed to raise the interest to 5 per cent. and by deed covenanted with the mortgagees, that the estate should remain a security for the 5000*l.* with interest at 5 per cent. and that he, his executors, &c. would pay such interest for the same. In January, 1782, *G S* died, the interest on the mortgage being in arrear for about 10 months; and the bill was brought (amongst other things) to have the 5000*l.* and interest paid out of the personal estate of *G S*, or at least the arrear of interest due at his death, and the additional 1 per cent. charged by the deed of 1779; but the Lord Chancellor was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought that the interest must follow the principal, and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge.

And where *M D* (*d*), by will of 15th of January, 1746, devised estates to trustees for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his

(*d*) *Basset v. Percival*, 21st July, 1786. Note (*a*) 2 P. Will. 665.

personal estate ; and subject to the term, he devised the estate in strict settlement with the ultimate limitation to his own right heirs, and he gave the residue of his personal estate to his executrix *C P.* The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 100*l.* and then died ; whilst the limitations in strict settlement subsisted, and after the death of *C P.*, her representative filed a bill to have a debt due to *C P.*, and her legacy, raised ; and the only person then entitled under the limitation in strict settlement dying, pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against *M D* and *M D P.*, the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of *C P.*, at 207*l.* and gave their joint and several bond for that sum ; this demand was afterwards assigned to *A B*, who also bought in debts to the amount of 327*l.* remaining due from the testator *M D*, and the co-heirs gave another joint and several bond to *A B*, for this sum also ; so that *A B* became the sole creditor on the estate, *M D* being dead, and a bill being filed by *A B* for payment of these sums of money, the question

was,

was, whether a moiety thereof should be raised in the first place out of the personal estate of *M D*, or out of the real? And his Honor was of opinion, that the real estate was the original debtor, and ought to bear the burthen.

Again, where *A* and *B* his wife, were seised of certain estates for their lives, with remainder to their eldest son *C*, in fee (*e*). By indentures of the 4th *December*, 1758, in consideration of 200*l.* stated to have been paid *A*, *B*, and *C*, they mortgaged part of the premises to *D*, for 1000 years, and subject to that mortgage conveyed the same to such uses as *C* should appoint; remainder to *A* for life, remainder to *C* in fee. A fine was levied, and *A* and *C* covenanted for payment of the mortgage money. In fact, the money was borrowed and applied for the benefit of *C* only. The mortgagee assigned to *E*, and he, in 1763, assigned to *F*, in which transaction all the parties again joined, and 100*l.* more was advanced, and *A* and *C* again covenanted for payment of the money. By deed of the 23d of *February*, 1767, reciting that the money had really been borrowed for the benefit of *C*, that he had covenanted

(*e*) *Woods v. Huntingford*, 3 Vez. Jun. 128.

with his father and mother to indemnify their life estates from these several mortgages, that no interest had been paid for the said 100*l.* by the said *C*, or *K* the trustee, but all interest accrued from the mortgage to *F* was still in arrear, and that *C* being desirous to be discharged as well from the payment of the principal sum of 300*l.* as the arrear of interest, and all that should grow due, which arrear and growing interest, he apprehended, would with the principal sum before the death of *A* and *B*, or before the said *C* should come into possession of the mortgaged premises, amount to the value of the fee-simple thereof, had applied to *A* to take upon himself the payment of the same, and to save harmless him, *C*; and that in consideration thereof, he would convey and assure all his right, title, and interest in the premises to *A* and his heirs; the said estates were conveyed with all the usual covenants from *C*, for further assurance and indemnity, and *K* the trustee was directed to stand seised to the use of *A*, who covenanted to pay all the arrears due on the mortgage. *A* afterwards borrowed a farther sum of 40*l.* from *F*, and made a new mortgage to him for the whole 340*l.*

Upon these facts, the question was, between
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the heir and the younger children, whether the mortgaged premises were to be exonerated by the personal estate of *A*.

His Honour said, this was one of the most doubtful questions he had ever had to determine. The inference he drew from these transactions was different from that Lord *Thurlow* drew from the transactions in *Tweddell v. Tweddell*, (*f*), for he was of opinion, that what had been done here was sufficient to make this the personal estate of the vendee; and he had taken great pains in order to shew that his determination did not in any degree contradict the principle there established. He should state the grounds upon which he thought this case differed from that. It might be said they were nice; but they were the only grounds that could exist, unless you lay down at once, that the debt never can be made the personal debt of the vendee, unless by his expressly declaring that it shall be his personal debt. It came to this point only, whether *by acts* it may not be necessarily inferred, that he meant to make it a debt of his own. *Tweddell v. Tweddell* had many expressions in it which so fully governed

(*P*) *Supra.*

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his opinion, that he could not wholly omit them. Lord *Thurlow* began by stating, that in the first place it was absolutely necessary the executor should be liable *at law*; for if not, it was impossible there could be any equity in the heir to call upon him to pay out of the personal estate, when he would not be liable to pay at law. But though he might be liable at law, it did by no means follow, that he should be equally liable in equity, where both the personal and real estate descending upon the same person, were liable to the debt. In the known case of an obligation, binding both the heir and the executor, the heir had a right to call for exoneration out of the personal estate, which must be first applied. When by the original contract, the personal estate was the original debtor, and the real only a collateral security, it was much stronger in favour of the heir. Then this case had arisen. A man made a contract, pledging both his real and personal estate; the latter by a general obligation; part or the whole of his real estate as a specific pledge, by way of mortgage. The estate descended upon his son as heir at law. The personal estate went to the executor; and the question was, who paid the debt? It was a mixed debt of the father, but the son's only as owner of the collateral pledge, and

he had a right to call upon the personal estate. Therefore if a person succeeding to an estate of that kind, had done no act to adopt the debt and make it his personal debt, his personal estate was not liable; but if by his act, he had put himself so far in the place of his ancestor as to make the debt his own, that was understood to be the same as if he was the original mortgagor: but the Court had been extremely anxious not to make that inference, unless where it was perfectly clear and obvious; therefore, though the mortgagee pressing for his money, the heir was obliged to have a transfer of the mortgage, and, as every one knew, no assignee would take it without some personal covenant, upon that transaction he executed a bond to the new mortgagee; if he did it only for that purpose, not meaning to make himself more liable, it had been determined not to make it the personal estate of the party whose original debt it was. It had been attempted to prove that what *A* had done came to that case, and that he joined only for that purpose. Most of the cases were of that kind; *Tweddell* and *Tweddell* was of a different nature (g). That was not the case of a mortgaged estate descending

(g) *Supra.*

upon the heir; but it was the purchase of an estate subject to a mortgage. There was no communication with the mortgagee; but upon the sale, there was a mere covenant of indemnity against the mortgage by the vendee. That is strongly relied on by Lord Thurlow. In commenting on *Tweddell v. Tweddell*, he does not seem to disapprove the case of *Parsons v. Freeman* (*h*); but seems to agree with Lord Hardwicke's reasoning, and recognizes the principle, as far as it can be taken from the short note in *Ambler*. He intimates his doubt of *Lord Rochford v. Belvidere*, upon which therefore I shall not rely, as there are many difficulties occurring against that judgment, though by so high an authority. *Tweddell v. Tweddell* amounts only to this, that where a man buys subject to a mortgage, and has no connection or contract or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself, as between his heir and executor; but merely that which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally.

(*b*) *Supra.*

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It remained (his Honour said) to consider whether in this determination, he did infringe upon that principle. He should be extremely sorry to do so, and had taken so much time in order to be sure he did not. It was very unpleasant for a Judge, where an inference was to be drawn from equivocal acts ; and the facts upon which the decision turned, were distinguished by such nice lines. This was a sale of the estate by *C* to *A*, who took upon himself the payment of this money, to which before he was liable at law, and *C* both at law and in equity. The question was, whether that transaction and the subsequent loan of 40*l.* and new mortgage by *A* acting as owner, did not make that debt his own ? He could not collect that Lord *Thurlow* said, a man never could make a debt his own without an express declaration ; and no case short of that could have that effect, if this was not sufficient. His Honour was of opinion, that under all these circumstances *A* had clearly adopted the debt and made it his own, though primarily the debt of his son in equity, and of himself and his son, at law. The transaction in 1767, and the subsequent one with *F*, shewed he meant to put himself in his son's place, who had therefore a right to be exonerated out of his personal estate.

I shall finish my observations on this subject with observing, that, upon a full investigation of this doctrine, it seems to warrant a conclusion, that in all questions of this nature, parol evidence is admissible as to the *quantum* of the debts, and the amount of the personal estate, and, so far as affects the personal estate, as to the declaration of the testator in that respect; for it appears plainly, that the throwing incumbrances upon the personal estate, though expressly charged upon the real estate, is an equity adopted in conformity to the principles of the common law, which favoured the terre-tenant. And an equity may in all cases be rebutted by parol evidence; for in such cases the evidence is not adduced in contradiction to the written instrument, but in support and affirmation of it, according to its legal operation.

Lord *Talbot* appears to have been clearly of opinion, that such evidence may, in such cases, be gone into, in order to ascertain the *quantum* of the debts, and the amount of the personal estate, from thence to decide on the intention of the testator, with respect to discharging the personal fund; for his Lordship observed, in the case of *Stapleton and Colville* (i),

(i) *Supra.*

that

that “what the *quantum* of the debts, or the amount of the personal estate was at the testator’s death, did not appear, if it did, it would give a great light into the matter.”

Lord Keeper *Henley*, indeed, in the case of *Stephenson* and *Heathcote*, expressly said, no examination could be had. But it is clear from his Lordship’s observations, that he did not advert to the principle upon which Lord *Talbot* was of a different opinion, and which is supported by innumerable instances at law and in equity. The Lord Keeper observed, upon the case of *Stephenson* and *Heathcote*, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it, and that upon general principles and rules, established in the cases, the Court could not go into the testator’s circumstances, as it would establish a rule not to be adhered to. Lord *Talbot* would not have denied this doctrine, had the equitable inference on the devise then in question been conformable to the express language of the will; but that not being the case, the real estate being expressly charged with his debts by the will, and the personal estate being only subjected thereto, by conclusion of equity, in express

contra,

contradiction to the language of the instrument, another principle, equally operative as that stated by Lord *Henley*, intervened, viz. that any evidence which tends to shew that the intention is conformable to, and in corroboration of, the letter of the instrument, is admissible, and ought to be received.

And Lady *Gaynsborough's* case appears to me to be fully in point as to the admissibility of parol evidence in such cases of the testator's declarations, respecting his personal estate and debts.

There Lord *Gaynsborough* devised several legacies (*k*), and charged them upon his *Rutlandshire* estate, and likewise charged his lands with the payment of his debts, and made his Lady executrix; but did not devise to her all his personal estate in express words; but it was in proof, that he declared that his Lady should have his personal estate, by five witnesses of reputation, and that my Lord found fault with the will after it was writ, because the personal estate was not given to her, and that the person who writ the will, told him, that being made

(*k*) Lady *Gaynsborough's* Case, 2 Freem. 188, 247.
Sc. 2 Vern. 252, 253.

executrix,

executrix, she had it by law, without any express gift. And it was held by the Lords Commissioners unanimously, that the Lady ought to have the personal estate, exempt from debts and legacies; because the written will charged all debts and legacies upon the lands, for there were seven legacies given, and in every paragraph the conclusion was, to be paid out of his lands; and although parol proofs could not be admitted in contradiction of the will, yet, when they went only in confirmation and corroboration of what appeared to be the testator's intent by his written will, there they might be made use of to fortify it. And it was decreed, that the lands should stand charged with the legacies, and in case my Lady was sued for any of the debts, she was to be reimbursed out of the lands.

Upon this principle of the evidence being in affirmance of the law on the written instrument (*l*), the Court declared, in the case of *Crompton and North*, where the testatrix devised her lands to *N*, to sell and dispose of for payment of debts, and the heir brought his bill, insisting, that as to the surplus after debts paid, it belonged to him by a resulting trust be-

(*l*) *Vid. 2 Vern. 253, 254.*

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ing not disposed of by the will ; that the estate in law being vested in the devisee, he should have been admitted to his proof of the testatrix's parol declaration, that she intended the surplus for the devisee, if it had been wanting and necessary.

CAP.

CAP. XIX.

OF THE PAYMENT OF INTEREST OF MONEY LENT ON MORTGAGE, &c.

BY the 12 Ann. st. 2. c. 16, sec. 1. all bonds and assurances for the payment of any principal money, to be lent upon usury, whereupon there shall be reserved, or *taken*, above five pounds in the hundred for a year, are declared utterly void.

Upon this clause of the statute, not only mortgages, where more than *5 per cent.* is reserved, will be void, but also mortgages, drawn only for *5 per cent.* if the mortgagee *takes* above that sum (a).

(a) 3 Atk. 154.

It

It is said to have been held by Lord *Hardwicke* (b), that if a contract were made *in England* for a mortgage of a plantation in the *West Indies*, no more than legal interest might be paid; and that a covenant, in such mortgage, for payment of 8 *per cent.* interest, would be within the statute of usury, notwithstanding this were the rate of interest where the lands lay.

But now this point is settled, by the 14 *Geo. 3. c. 79, s. 2.* whereby it is enacted, "That none of his Majesty's subjects, in *Great-Britain*, shall be subject or liable to any of the penalties or forfeitures inflicted by the 12 *Ann.* by receiving, or taking interest for, any sum or sums of money, really and *bond fide* lent on any mortgage, &c. of lands in *Ireland*, or in the colonies or plantations in the *West Indies*, the securities for which are made and executed in *Great-Britain*, so as the interest, so to be received or taken, do not exceed the rate of six pounds for one hundred pounds for a year."

But it seems that this statute, being an enabling act, extends only to the particular cases therein mentioned, and does not reach any

(b) *Stapleton v. Conway*, 3 *Atk.* 727. 1 *Vez.* 428.
others.

others. Now it enacts, that mortgages and other securities, respecting *lands* in *Ireland* and the *West-Indies*, reserving interest allowed in those countries, shall be valid, though executed in *England*; but does not mention personal contracts; if so, a bond taken together with such mortgage, reserving greater interest than is allowed by the laws of this country, will, it should seem, be void as *usurious*.

No case has, as yet, been decided on this question, in relation to a mortgage; but where a bond was given in *England* for 2800*l.* with a condition (*c*), which, after reciting an agreement made in *June*, 1769, between *A* and *B* for the purchase of an estate in *St. Christopher's*, by the former of the latter for 1800*l.* and that it was agreed, *at the making of that contract*, and *it was part of the terms thereof*, that 1400*l.* part of it, should remain secured by a joint bond of *A*, and another person, to be in that behalf appointed, and who was resident in *England*; in consequence of which, he, together with *H*, became bound to *B* for the 1400*l.* with interest at 6*l. per cent.* and also reciting that it had been since proposed and agreed between *A* and *D B*, son of *B*, then deceased,

(c) Dewar v. Span, 3 Term Rep. 425.

I that

that the former bond should be cancelled, and a new bond given for the 1400*l.* with interest at 6*l. per cent.* agreeable to the original contract was, that, on payment of 1400*l.* by *A* or *S*, the co-obligor and defendant, with interest at 6*l. per cent.* &c. the bond should be void; on a plea to an action brought thereupon, that after the 29th of *September*, 1714, and after the death of *DB*'s father, and before the making of this bond, it was, corruptly and against the form of the statute, agreed between *DB* and *A*, that the bond so entered into by *A* and *H* should be cancelled, and that *DB* should forbear and give farther time of payment of the sum of 1400*l.* until the 25th of *June*, 1788, and should for such his forbearance be paid interest on the 1400*l.* in the mean time, after the rate of 6*l.* for every 100*l.* by the year; and that for securing the payment as well of the 1400*l.* as the interest, &c. this bond was given; with an averment that the former bond was given up to be cancelled by means, &c. the present bond was void; it was held by the Court of King's Bench, unanimously, to be void *on the ground of usury.*

But the statute of Queen *Anne* has no retrospect to contracts made previous thereto; for they

they may carry interest according to the interest allowed on agreements, at the time the debt was contracted (*d*).

A distinction is made in Chancery between an agreement (*e*), that the interest shall be raised if not punctually paid, and for abatement thereof upon punctual payment. For, in the former case, it is considered as a penalty, against which the courts of equity will relieve; but in the latter, as a condition, which must be strictly adhered to; in which case, the debtor cannot have relief, in equity, after the day of payment elapsed; because the abatement is to be upon a condition, which is not performed (*f*).

Thus (*g*), where (before the reduction of interest to 5 per cent.) a mortgagee lent money at 6 per cent. but agreed in the deed, that, if the money was paid within three months after it became due, he would accept of 5 per cent.

(*d*) *Walker v. Penry*, 2 Vern. 42. 78. 145. *Sc. 1 Eq.*
Ca. Abr. 288. Sc. cont. Pre. Ch. 50.

(*e*) 3 Burrows, 1374, 1375.

(*f*) This distinction holds in all cases of compositions, &c. if money not paid at the day, equity will not relieve.
3 Atk. 585.

(*g*) *Jory v. Cox*, Pre. Ch. 160. *Barnard 481. Nichols v. Maynard*, 3 Atk. Rep. 520.

The mortgagor not paying the money within the time, the question was, whether he should pay *5l.* or *6l. per cent?* And it was held by the Court, that interest must be paid at six *per cent.*; for though relief was given against unreasonable penalties, yet this was not so, for the mortgagee might have refused to lend his money under *6 per cent.*

But where (*h*), on a bill to foreclose a mortgage, the interest, by the deed, was to be *5 per cent. per ann.* payable half yearly, and if not paid by the space of two months after the time of payment, *then to be raised to 5l. 10s. per cent. per ann.* for increase of interest. The interest being run greatly in arrear, the question was, after what rate it should be computed on redemption of the mortgage? And it was decreed to be computed at the rate of *5 per cent. per ann. only*: for, where the interest was to be increased, if not paid at the day, that was but in the nature of a penalty, and relievable in equity.

But it seems, that if there be a covenant for payment of the additional *1 per cent.*, the Court will not relieve against it.

(*b*) Shrode *v.* Parker, 2 Vern. 316. Holles *v.* Wyse, 2 Vern. 289. Nichols *v.* Maynard, 3 Atk. 520. Thus,

Thus (*i*), where money was lent on mortgage at *5 per cent.* and the mortgagor covenanted to pay *6 per cent.* if he made default in payment of interest for the space of sixty days, after the time of payment; the Court decreed, that, from default made, the mortgagor should pay *6 per cent.* (*k*); for that this covenant was the agreement of the parties, and not to be relieved against as a penalty. *Quære*, if such covenant must not be in a separate deed, though I should think that would make no difference.

And, if an indulgence be given by the mortgagee, such agreement will be good to raise the interest, upon the ground of forbearance (*l*); such additional interest not being considered, in that case, as a penalty, but as a liquidated satisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in *Ireland*, to trustees, by way of securing debts to creditors, and no money actually passed, but the sum nominally lent was to be paid by instalments; an agreement that the interest of those sums should rise, on non-payment, at the time

(*i*) Marquis of Halifax *v.* Higgens, 2 Vern. 134.

(*k*) Pre. Ch. 161. *Vid. Howard v. Harris, supra.*

(*l*) Burton, *et al. v. Slattery*, 3 Brown's Parl. Ca. 68.

appointed, or within three weeks after, from 5 to 8 *per cent.* was held good, upon an appeal to the House of Lords.

And, in a similar case (*m*), where a long arrear of interest had accrued, and the mortgagee had sent an account thereof to the mortgagor, who returned an answer, admitting the account, *desiring forbearance*, and promising to make satisfaction for the same. Lord Chancellor Parker allowed the additional 1 *per cent.* reserved, as a satisfaction; saying, that though the proviso, obliging the party to pay 6 *per cent.* was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved against, if only a very short lapse had happened; yet it might not be relievableness against, in case of a long arrear of interest; and that if no reservation of 6 *per cent.* had been made, and a great arrear of interest had incurred, the Court, on such a promise, in writing, to make a satisfaction for forbearance, would have given the mortgagee some allowance in that respect.

We must observe, in this case, that the mortgagee had, originally, made himself judge what recompence he should have, in case the

(*m*) Brown *v.* Barkham, *infra.* 988.

agree-

agreement for payment of interest was not performed, and the *mortgagor had acquiesced* therein; and therefore there would have been no equity in the Court interfering to alter it.

It is a rule and course of the Court of Chancery, on reference to a Master, to state an account upon a mortgage (*n*), that all money paid as surety, shall be reckoned as principal money from the time of payment, and interest allowed thereupon accordingly.

So, likewise, the practice is (*o*), that if the mortgagee assign the mortgage, with the concurrence of the mortgagor, *all money*, really paid by the assignee, that was due to the mortgagee, shall be considered principal, and that the assignee shall have interest upon the interest *then due, and paid by him, as well as upon the principal originally lent.*

But it is otherwise (*p*), if the assignee hath not paid the money, and the assignment be only

(*n*) Morley *v.* Elwis, 2 Keb. 376.

(*o*) Smith *v.* Pemberton, 1 Ch. Ca. 67, 68. *Ibid.* 258.

1 Vern. 169. 2 Vern. 135. Bacon Abr. 658.

(*p*) 1 Ch. Ca. 68. 1 Eq. Ca. Abr. 329. 1.

colourable, in order to load the mortgagor with compound interest.

The account between the mortgagee and assignee will not conclude the mortgagor, where the latter is not party or privy to the assignment (*q*).

Thus where (*r*), upon the assignment of a mortgage, the debt was stated between the assignee, the mortgagee, and some of the co-heirs that were looked upon to have a right to the redemption; it was insisted, that this ought to conclude the plaintiff, who claimed as devisee under the will of the mortgagor, as a stated account: but he being no party thereto, that was over-ruled by the Court.

Another case (*s*), illustrative of the practice as to the inconclusiveness of the account between the mortgagee and assignee on the mortgagor, occurred lately. The substance of the case was stated in the judgment which was given by

(*q*) *Vid. supra.* 202, 4.

(*r*) Earl of Macclesfield *v.* Fitton, 1 Vern. 168. *Infra.*
974. 1 Chan. Ca. 68.

(*s*) Matthews *v.* Walwyn, Shepheard, and Co. Lincoln's-Inn Hall, Aug. 6, 1798.

Lord *Loughborough*, Chancellor, with which I have been favoured. His Lordship said, "the question was, whether the assignee of a mortgage had a right to be paid according to the sum appearing due on that mortgage, whatever might have been the state of accounts between the mortgagor and mortgagee. The circumstances of the case had nothing in them so particular as to vary the general question. *M* had created a mortgage on his estate, on which *S* had advanced some money as being his attorney. The purpose of creating that mortgage was, that money might be raised for the use of *M*. The sum that was actually paid by *S* to *M* did not go to the whole extent of it, because by subsequent dealings, that sum which was actually paid by *S* to *M*, was in fact reduced. *S* ought not to have made any use of that mortgage, but to have raised money on it for the use of *M*. But *S* thought fit to make an assignment of this mortgage, and the assignees of the mortgage claimed to hold it to the full extent of the sum appearing due on the face of the mortgage deed." When this case was agitated before his Lordship, a case was referred to, in which it was supposed my Lord *Thurlow* had entertained, not decided, but it was intimated that he entertained an idea, that if a

mortgagor had permitted the mortgage deeds, without any indorsement, to be in the possession of the mortgagee, an assignee taking under that mortgagee, might have a right to hold the mortgage to the whole extent of the sum appearing **due on** it against the mortgagor. It was also stated, that in practice it was supposed that persons dealing in such securities were bound to know the mortgagor, though that in some cases might be difficult; and that the assignee of a mortgage was bound to settle accounts, as the person would have been from whom he took the assignment.

" I thought it material to get such information, as one can, in inquiries of this kind, with respect to the practice; and I believe the general result is this, that persons most conversant in conveyancing hold, that it is extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage without the *privity* of the mortgagor, from whom he might learn the sum really due on it. In fact the assignments of mortgages are sometimes made without calling on the mortgagor, but in these cases the assignments are taken as the best security a man can get for a debt not very well secured, or in the course of transactions for
raising

raising money on such slender securities as they can find it. But I understand, among conveyancers, no gentleman of established practice would recommend to take as a title, and as a good title, the assignment of a mortgage, without making the mortgagor a party *privy* to that assignment, and without being *satisfied from him* of the money that is really due on the mortgage. With respect to a case that was quoted, I believe, from the circumstances, of the first order, there might be some doubt expressed at the time on the point. The name of the case to which I allude is *Lun and others, assignees of Lodge, a bankrupt, v. St. John and some other parties.* *L* granted a mortgage to *P*, who made an assignment of it to *St. John*, for a sum less in fact than the money appearing to be due on the mortgage. The case as stated was this. *L* made a mortgage to *P* for 2000*l.* *P* being indebted to *St. John* in the sum of 1100*l.* assigned the mortgage to him by an indorsement, stamped and signed, but not sealed, as a further security for the repayment of the principal sum of 1100*l.* Afterwards *L* and *P* both became bankrupts, and *L*'s assignees filed a bill to open the account alledging error, and insisting that nothing was due. It was objected that the plaintiffs must redeem *St. John*, who had

had nothing to do with the accounts between *L* and *P*, but was a fair assignee without notice of any transactions or accounts between *L* and *P*. The Chancellor (Lord *Thurlow*), referred the account to the Master, and gave him special directions to say what was due at the time of the mortgage, and also what was due on that mortgage at the time of the assignment, and what remained due on it; saving the point, how far *St. John* should be affected, till after the Master made that special report. It came on afterwards, on the Master's report, before the Lords Commissioners, and the Master having reported that *P* was indebted to *L* in the sum of 7000*l.* the order that was made by the Court declared, that the assignment dated, &c. made by *P* to *St. John*, was to be deemed null and void against the estate of *L* the bankrupt; that the assignment was to be delivered up to the assignees of *L* to be cancelled; that *St. John* also was to deliver up to the plaintiffs all deeds, papers and writings, that came to their hands, or were within their power relating to the estate; and that *St. John* should re-convey to the plaintiffs, the assignees of *L*. Therefore the final result of that case was, that nothing was due on the original mortgage, and that the two assignees of that mortgage took no benefit from it.

it. The account was settled on the foot of the original mortgage, and the estate was re-conveyed. So far the determination of this case is a direct authority for *M.*

"The cases that have been decided, and long decided too, bear very much on this case. In Vernon, and the Precedents in Chancery, the case is now perfectly settled, that, as between mortgagee, and any person claiming under him, without the privity of the mortgagor, you cannot settle the accounts. Yet if the mortgagee has been in possession, and the assignee has been in possession, the assignee is bound to settle the accounts of rents and profits with the mortgagee.

On considering a little the general principle on which this court acts, with regard to mortgages, I do not feel any difficulty in deciding this point. It is true, a mortgage may be considered as the conveyance of a legal term; but then it must be apparent on the face of the title, that it is not an absolute conveyance of a term, but the conveyance of a term, or of the inheritance of the estate, as a security for a debt; and that the real transaction is an assignment for a debt from *A* to *B*, that debt being collaterally

collaterally secured by a charge on the real estate. On this principle, therefore, it is obvious, if an action was brought on the bond, in the name of the mortgagee, the mortgagor would pay no more than the sum found due on the bond; or in covenant, brought in the name of the covenantee, the accounts must be settled in that action, according to the amount of the principal money and interest. There seems to be no reason in this Court, why the condition of the assignee of a mortgage should be better than it is at law, to recover that, which was transferred to him by the assignment (*t*).

The principle first laid down by Lord *Loughborough*, in the case of *Matthews v. Shepheard*, that the real transaction in the transfer of a mortgage, amounts merely to an assignment of

(*t*) Note, The Lord Chancellor, after delivering his judgment in this case, said, "I was referred by a note to a book, which I am not acquainted with, nor am I acquainted with its character. Powell, on Mortgages. It is said, that in page 223 and 277, he treats this point as clear." Mr. Solicitor General said, "Mr. Powell is a gentleman of considerable practice." The Author thinks it necessary to insert this note, the observation having been *grossly misrepresented*, in stating this case, in several daily papers.

a debt,

a debt, collaterally secured by a charge on the real estate, being admitted, the conclusion his Lordship drew, on general reasoning, will be found to follow, as a necessary consequence, in a Court of Equity; for, taking the mortgage as a debt, if it be not on a negotiable contract, it is merely a *chose* in action, for which the assignee has no remedy at law, or right to sue in his own name, and has only *an equitable* remedy, which fails when the debtor has a legal discharge, as a release upon payment of the money, or any part of it.

But if the debt were on a negotiable security, as a bill of exchange (*u*), and the mortgagee, after payment of a part of it by the mortgagor, actually negotiated the note for value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor, on liquidating the account, although he had paid it before; because the indorsee or assignee has a legal right to the note, and a legal remedy at law, which a Court of Equity ought not to take away from him, but to allow him the benefit of on the account.

(u) Collaterally secured by a mortgage.

And

And here (*x*) we must particularly remark, that *generally* an assignment, to give title to interest on interest, must be made with the concurrence of the mortgagor; for where it is assigned without his assent, the assignee must take it *only* upon the same terms with the assignor.

Thus (*y*), where the bill was to have the redemption of a mortgage of the manors of *B* and *S*, in the county of *C*, which mortgage had been assigned to *F*, one point was, whether, there being great arrears due at the time of the assignment, which were paid by *F*, the money paid for interest, *then* in arrear, should be reckoned principal as to him, and carry interest with it? And it was insisted for the mortgagor, that interest was never made principal, in such case, unless the mortgagor had joined in the assignment; and the case of *Porter* and *Hubbart* (*z*) was cited, where, in a like case, it was decreed, that interest should be reckoned principal; but the decree was reversed

(*x*) *Ashenhurst v. James*, 3 Atk. 271. *Porter v. Hubbart*, 3 Rep. Ch. 78. Sc. Nelson 150.

(*y*) *Earl of Macclesfield v. Fitton*, 1 Vern. 168. *Supra*, 966.

(*z*) *Porter v. Hubbart*, 2 Ch. Rep. 86. 3 *ibid.* 78.

in the House of Lords; because the executor of the mortgagor was no party. But the Lord Keeper said, *that* precedent could not weigh much with him, he was of counsel therein, and it was hard in all its circumstances. For although he thought it reasonable, that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent. However, his Lordship directed the defendant's counsel to search for precedents, and said, that if they could find any one, he would follow it in this case; but no such precedent could be found.

This rule admits of distinctions in particular circumstances.

Thus (*a*), where creditors procure a decree for sale of an estate before a Master, and one, by consent of all parties entitled to the estate (being confirmed the best bidder by authority of the Court, all the incumbrancers agreeing he shall be purchaser) takes an assignment of all incumbrances; in this case, he will be a creditor of the mortgagor for the whole sum, as well what he paid for interest due, as for prin-

(*a*) *Ashenhurst v. James*, 3 Atk. 271. *Supra*, 974.
cipal,

cipal, together with interest upon the interest, their consent being the same thing, as if they had been made parties to the assignment.

It is said, that in *Hilary* vacation, a little before *Easter* term, in the 26th and 27th Car. 2 (b), the Lord Keeper declared it should be the rule that a mortgagee, on his mortgage being forfeited, should have interest for his interest.

Thus (c), where a mortgage was made in June 1678, for 450*l.* principal money, payable at the end of five years, and interest in the mean time half-yearly; and, about two months before the five years were expired, the mortgagee (no interest having been paid) assigned the mortgage to the defendant in consideration of 560*l.* being so much due for principal and interest; the question was, whether the interest then due should carry interest? It was objected, that the mortgagee ought not to have assigned until the five years were expired; *sed non allocatur*, for the mortgage was forfeited long before, by non-payment of the interest; and the

(b) 1 Ch. Ca. 258.

(c) Gladman *v.* Henchman, 2 Vern. 135. Hill. 1690.

560*l.*

560*l.* was decreed to be paid, with interest, from the time of the assignment.

But this rule, if ever made, seems to have been laid aside soon afterwards; for, where *G(d)*, in 1641, made a mortgage in fee of lands, worth about 30*l. per annum*, to *C*, to secure 300*l.*; in 1652, the mortgagee took possession, and in 1660, devised the lands to *A*; in 1680 (which was five years after the rule above-mentioned is said to have been made) the devisee brought a bill to foreclose. The wife of the mortgagor had recovered a third part, as dower, against the mortgagee, so that the profits did not answer the interest of the money, which was then 8 *per cent.* and there had been infancies on the plaintiff's part for several years. The Master of the Rolls decreed the plaintiff to redeem, and pay 8 *per cent. only*, that being then legal interest; and said, that, though the profits were not sufficient to answer the interest, yet the arrears could not carry interest, although the costs and charges must.

A Master's report (*e*), computing interest,

(*d*) *Procter v. Cooper*, Pre. Ch. 116. Trin. 1700.

(*e*) *Bacon v. Clerk*, 1 P. Will. 478. Sc. Pre. Ch. 500.

² Eq. Ca. Abr. 530. 9. *Creuse v. Hunter*, 2 Vez. Jun. 159.

makes that interest principal, and to carry interest; for a report is as the judgment of the Court, and appoints a day for the payment, carrying on interest to that day; and the parties disobedience to the Court, in not complying with the time of payment, ought to subject him to interest.

But the report (*f*) must be confirmed; for, where *A*, the defendant, insisted that 800*l.* was owing to him, and, upon the Master's report, only 180*l.* appeared due; the Court ordered interest for that sum, from the time of confirming the report absolute, *and not before*; because, until then, it was not any liquidated sum.

Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report (*g*).

And although the report *be* confirmed, yet, if the suit be for a sale, and not to foreclose,

(*f*) 1 P. Will. Rep. 453. 480. Kelly *v.* Lord Bellew, 1 Brown's Parl. Ca. 202. *ibid.* 566. 2 Vez. Jun. 159. Moseley 27. Attorney General at Relation Islington Overseers *et al.*
1 P. Will. Rep. 376. 480. 2 Eq. Ca. Abr. 530.

(*g*) Moseley 247. 1 Vez. 495.

interest shall not carry interest, if there be other mortgagees, and bond creditors, parties thereto.

Thus (*h*), where the plaintiff, a mortgagee, brought a bill, in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premises, and had a decree accordingly, with a direction to pay the mortgagee his principal and interest, in the first place the Master made a report of a stated sum due, which was confirmed; the mortgagee then moved, that the Master might compute subsequent interest and costs upon the sum reported due. There was not near enough arising from the sale, to pay the second mortgagee and the bond creditors. The rest of the creditors and the mortgagor opposed this motion, and endeavoured to shew a difference between the present bill and a bill of foreclosure, insisting, that, in the latter, the Court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the Court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest

(*b*) *Harris v. Harris*, 3 Atk. 722.

of the other creditors was concerned; therefore, it would be hard to give interest upon interest in favour of one creditor, to the prejudice of the rest. And the Lord Chancellor allowed the distinction, saying, that it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carried *5 per cent.* and proposed to the counsel, that, from the time of the Master's report being confirmed, it should carry only *4 per cent.* in which the plaintiff acquiesced.

Where the Court enlarges the time for a mortgagor (*i*), or a subsequent mortgagee, that is a favour, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal, interest, and costs, are lumped into one sum by a Master; if the mortgagor, on a *puisne* mortgagee, pray longer time to redeem, they always pay interest for the whole sum.

It seems, in general, that an account (though before a Master) against an infant, on a bill to foreclose, shall not carry interest on interest.

(*i*) Moseley, 246, 247.

Sa,

So, upon a bill (*k*) being brought, that an infant might redeem a mortgage, or be foreclosed; upon the hearing, it was decreed to an account, and that the infant should pay what was reported due, unless he shewed cause to the contrary, within six months after he became of age. A report was made, and confirmed, of 2600*l.* due; and, upon a subsequent order being made to compute interest from the report, the Lord Keeper doubted, whether interest ought to be allowed for the interest.

And I should apprehend that, in such case (*l*), generally speaking, interest upon interest ought not to be allowed against an infant; because one ground, upon which the Court turn the interest into principal, is by way of inflicting punishment on the mortgagor for non-performance of his contract, which motive ought not to operate against an infant. For the same reason, on which the Court indulges him with the privilege of shewing cause, after he comes of age, namely his presumed incapacity in the management of his affairs, which discharges him from any consequences incurred by, or

(*k*) *Bennet v. Edwards et al.* 2 Vern. 392.

(*l*) Litt. Sec. 402, 3, 4. Lord Raym. 25. Gilb. Ten. 32.

penalty inflicted on, the ground of negligence, operates equally against loading him with compound interest upon an account, when it may be presumed, that the like imbecility, which induces the Court to indulge him with an opportunity of shewing cause against a decree of foreclosure, or other decree charging his estate, likewise occasions the non-payment of the interest (*m*).

And if the decree were, that, on non-payment of what should be reported due, the infant should be foreclosed, unless cause were shewn to the contrary within six months, &c. the case would be still stronger against allowing interest upon interest. First, because, by such decree, the mortgagee has the penalty which he annexed to the non-performance of the contract by the mortgagor, namely, the estate discharged from the condition. Secondly, because one ground upon which the Court turns the interest into principal, is, as a recompence to the mortgagee for the delay he receives, by reason of the indulgence given by the Court to the mortgagor, in allowing time for redemption, which reason does not apply here; as, in

(*m*) *Et vid.* the case of Sir Redmond Everard *v.* Eliz. Aston, 2 Brown's Par. Ca. 56. Vin. vol. 12. p. 113. Ca. 47.
the

the case of an infant, the foreclosure takes place immediately, but subject to be opened within six months after he attains his age, if the infant's defence be mistaken, or there be any irregularity on the part of the mortgagee.

But here we must remark an exception to this rule, as to infants, where an *account and report* are taken and made, in a cause where an *infant* is *plaintiff*; for there the sum will bear interest from the foot of the account; nothing being more certain, or established, than that a minor is bound and concluded thereby, unless he shew fraud, or error to his prejudice; for it would be not only inequitable, but unreasonable, to take from such defendant, the *benefit* of making use of those proceedings, which he is *forced into* by the infant, and thereby to subject him to the difficulty and expence of taking a new account.

Thus, where *Thomas Odell*, an infant (*n*), to whom the equity of redemption of a mortgage for years descended on the death of his father (who had exhibited his bill, in the Court of Exchequer in *Ireland*), against the mortgagee

(*n*) *Baddam v. Odell* an infant, and *Fitzmaurice* his guardian, 4 Brown's Parl. Ca. 447.

and his assignee, to redeem the premises, and for an account of the money due on the mortgage) filed his bill of revivor; the cause was heard, and the Court decreed, that it should be referred to the remembrancer, to state and settle an account, who made his report, that 1883*l.* 18*s.* was due for principal *and interest*, which, there being no objections made, or exceptions taken thereto, was absolutely confirmed. And the cause coming on for farther hearing, it was decreed, that upon the mortgagor's paying the sum of 1883*l.* 18*s.* so reported due, *with interest for the same*, from the time of the report being confirmed *absolute*, the premises should be re-conveyed, and all bonds and securities delivered up.

Afterwards, *Odell* neglecting to pay the money reported due, or any interest for the same, the mortgagee, who had likewise had a suit pending, filed an amended and supplemental bill, in order to have the benefit of the decree, by a sale or absolute foreclosure; and therein, in regard the account of what was due on the said mortgage had been stated in the former cause, prayed to have the benefit thereof, and that the account should be taken, in his present suit, on the foot of the report or decree made in the former suit.

To

To this bill *Odell* put in his answer, and thereby, amongst other things, admitted the former report, decree, and proceedings; but insisted that, apprehending he was much aggrieved by those proceedings, he chose to have his bill, upon which the said decrees were made, dismissed rather than submit thereto. Afterwards, the cause came on to be heard, when the Court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the said former cause, but, that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the chief remembrancer, or his deputy, to audit and state an account, between the plaintiff and defendant, on the foot of the mortgages and securities in the pleadings mentioned, in which account both parties were to have all just allowances.

From this decree, the mortgagee appealed, insisting, that the infant ought to be concluded by the account, taken in the former cause, on a bill originally brought by his father, revived, and carried on by himself, confirmed by subsequent orders of the Court, and signed and enrolled; and that he ought not to be permitted

ted to wave, or vary the same, especially when neither fraud nor error in the account were even suggested.

And so it was adjudged, as to that point, and the decree reversed; and it was farther ordered, that the account taken upon the former decree should stand, with liberty for the infant to surcharge, or falsify the same; and that, in case of any surcharge, or falsification, the remembrancer should deduct so much as ought to be deducted on account thereof; and that the remembrancer should carry on the account of the *subsequent interest, from the time of the confirmation of the former report*, for the sum thereby reported due, after such deductions made thereout as aforesaid.

So, likewise, a distinction is made (o), where an infant concerned agrees to allow interest on interest, and a benefit accrues to him thereby, and it would be unjust to take it from the mortgagee; for, in such case, it shall be allowed; as the law, at the same time that it protects the imbecility and indiscretion of infants from injury through their own imprudence, enables them to do binding acts for their bene-

(o) Co. Litt. 315. a.

fit,

fit, and, without prejudice to themselves, for the benefit of others; for the end of the privilege being their protection, to *that object*, all the rules, and their exceptions, must be directed; and *not* to give such acts stability, would be turning their privilege of infancy *against* themselves.

Thus, where *JS* mortgaged his estate to *C*, and then died, leaving *D*, his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate (*p*). The mortgage having been suffered to run in arrear three years and a half, *C* grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which *D*'s mother, with the privity of her nearest relations, stated the account; and *D* being then near of age, signed it, and it was admitted to be fair. It was resolved, by the Court, that though, regularly, interest should not carry interest against an infant, yet, in some cases, and upon some circumstances, it would be injustice, if interest should not be made principal; and the rather, in this instance, because it was for the infant's

(*p*) Earl of Chesterfield *v.* Lady Cromwell, 1 Eq. Ca. Abr. 287. 1.

benefit,

benefit, who, without this agreement, would have been destitute of subsistence.

Besides, in this case (*q*), the mortgagee might have obtained immediate payment of principal and interest, by exhibiting his bill to compel a sale-for payment of debts.

But, in general, interest shall not carry interest upon a mortgagor's signing an account (*r*) whereby he admits so much due for interest; because that, of itself, does not shew any agreement, or intent to alter the interest, or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been so determined; for it seems that, to make interest on a mortgage principal, it is requisite there should be a *writing* signed by the parties, *the estate, in the land, being to be charged therewith*.

Lord Keeper North was of opinion, in the case of *Howard v. Harris*, that if there were a covenant in the mortgage-deed for payment of the interest, upon which an action of debt would lie, the Court would allow interest on

(*q*) *Infra.*

(*r*) *Brown v. Barkham*, 1 P. Will. Rep. 652. *Supra.* 964.
interest,

interest, though no account was taken before a master (*s.*). In that case a mortgage for 1000*l.* had been made, upon a reversion ten years, and in the deed there were covenants for payment of the principal and 6*l.* *per annum* interest, and 7*l.* *per annum* rent was *only* reserved; and it was urged, that the mortgagee, against whom the bill was exhibited to redeem, ought, in this case, to have interest upon interest, otherwise he would be a great loser. To which it was answered, that the bill had been filed six years, and that the mortgagee had, by answer, opposed the redemption, and therefore, from that time, he had no pretence for an allowance of interest for his damages; and that it was never known in the Court that interest upon interest was at any time allowed in such case.

But the Lord Keeper was clearly of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it, and therefore it was reasonable that there should be damages given for the non-payment of that

(*s.*) Howard *v.* Harris, 2 Ch. Ca. 147 to 150. Sc. 1 Vern. 194. 1 Vent. 364. *Supra.* 713.

money.

money. As to what had been urged, that this had never been practised, and that there was not any such precedent in the Court, and that if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice of the Court, and make all mortgagors pay interest upon interest; the Lord Keeper said, that he was clear in the distinction between debt and damages, and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premises out of the 6*l.* a year, payable for the interest, the defendant should be allowed interest for the residue of the said 6*l.* a year, *for which* the mortgagee might have *sued at law* and *recovered damages.*

But here we must attend to the distinction between the last case, where the security for the interest rested in *covenant only*, and the ordinary cases, where the rents of the mortgaged premises are sufficient to pay the interest, as, if this determination be according to law, it ap-

pears to me it must have turned upon that point; for it is certain, that, in general, an agreement made at the time of the mortgage (and a covenant in truth is no more than an agreement) will not be sufficient to make future interest principal, such terms being considered as carrying somewhat of fraud with them; not such fraud as is properly deceit, but such proceedings as lay a particular burden and hardship upon a man; and against which, therefore, a court of equity relieves.

Thus, where *Y* made a mortgage to *O*, with a proviso, that if the interest was six months in arrear, then it should be accounted principal and carry interest (*t*); Lord Chancellor *Cowper* decreed the clause to be vain and of no use, for that an agreement, *made at the time of the mortgage*, would not be sufficient to make future interest principal, but it was requisite that interest should be first grown due, when an agreement concerning it might then make it principal.

(*t*) *Lord Offulton v. Lord Yarmouth*, Salk. 449. *et vid.* *Mosely*, 247, *et Meers's case before Lord Harcourt*, mentioned in *Bosanquet v. Dashwood*, Ca. T. Talbot, 40 *et 1 Atk.* 304, 305.

And

And so was it likewise held in the case of *Thornhill v. Evans* (*u*) ; but then it must be upon a *fair agreement*, and is said to have been generally done on the advance of fresh money.

Interest upon interest will never be allowed (*x*), because interest is in arrear *when* the mortgage is paid off.

G, in 1741, made a mortgage in fee for 300*l.* to *C*, of lands worth about 30*l. per annum* (*y*). In 1652, the mortgagee took possession, and, in 1660, devised the lands to *E*. In 1686, the devisee brought a bill to foreclose, to which the defendant pleaded a settlement prior to the mortgage, but that was found fraudulent ; and the wife of the mortgagor had recovered a third part of the estate as dower against the mortgagee, whereby the profits did not answer the interest of the money, which was then 8 *per cent.* *Et per curiam* : the plaintiff must redeem, and shall pay 8 *per cent.* only to the time of the ordinance of Parliament that reduced the in-

(*u*) *Thornhill v. Evans*, 2 Atk. 331.

(*x*) *Ibid. et vid. Pre. Ch.* 116.

(*y*) *Proctor v. Cooper, Pre. Chan.* 116.

terest of moneys; and though the profits were not sufficient to answer the intent, yet the arrears cannot carry interest, but the cost and charges must.

A mortgagee in possession is not obliged to lay out money *any farther* than to keep the estate in necessary repair (*z*); but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it will carry interest.

A remainder-man can force the tenant for life to keep the interest down if the land be charged (*a*), but cannot compel him to redeem directly, though indirectly he may by purchasing in the mortgage; then the tenant for life must pay one-third, or part with the possession.

Thus, where *A* granted a charge of 100*l. per annum* in fee (*b*), and devised estates to *B* for life, remainder to *C* in fee, and then died. *C*

(*z*) 3 Atk. 518.

(*a*) Hungerford *v.* Hungerford, Gilb. Rep. Eq. 69.

(*b*) Cited in Hayes *v.* Hayes, 1 Ch. Ca. 223.

exhibited his bill, to compel the tenant for life to pay the arrears, as otherwise all would fall on the reversioner, and it was so decreed.

If there be tenant in tail (*c*), remainder over, subject to a preceding mortgage or incumbrance, and tenant in tail be in possession, and receipt of the rents and profits, and lets the interest run in arrear, without applying them to keep it down, neither the issue in tail nor the remainder-man, can come against the tenant in tail, to compel the keeping down the interest, or against his representatives after his death, to compel the indemnifying and discharging the remainder from the arrears of interest (*d*), incurred during his possession and receipt of the profits; for in this case, courts of law as well as of equity consider the reversioner, or remainder-man, as in the power of the tenant in tail.

Thus, where *PC* made a mortgage for years (*e*) and then entailed the estate mortgaged on himself and the heirs male of his body, remainder

(*c*) *Amesbury v. Brown*, 1 Vez. 477. 2 Bro. Chan. Rep. 123.

(*d*) 1 Vez. 480.

(*e*) *Chaplin v. Chaplin*, 3 P. Will. 235. Hilary, 1733.
to

to his brother *I C* in tail male, and afterwards died, leaving issue one infant son; the latter suffered the interest to run in arrear for near twenty years, and died just before he came of age, leaving a personal estate. Upon a bill filed against his representatives, it was insisted, that his executors, seeing their testator took the rents and profits of the estate, ought to keep down the interest, and the rather, he having never had it in his power to bar the estate by a recovery; *sed per curiam*, there was no precedent of a tenant in tail being obliged to keep down the interest upon a mortgage; for he had an estate which might last for ever, and the remainder over was not assets or regarded in law; and as he had a power over the estate, to commit any waste or spoil thereon, a court of equity had never enjoined him to keep down the interest; and the court refused to make any order upon the executors to pay the arrears.

But by a later decision it seems now to be settled, that if tenant in tail be an infant, *not otherwise*, and his guardians or trustees be in possession of the profits of the estate, he shall be liable to pay the interest, because what *ought* to be done by the guardian, should be con-

sidered as done, and it is a rule, that the act of a guardian or trustee of an infant shall not alter his property, or *that of those coming after him* (*f*) ; and the reason why tenant in tail is not liable to pay the interest, which is because he can bar the whole estate, does not operate in this case; for an infant cannot bar the remainders, unless under the king's privy seal (*g*), which is never granted voluntarily to change the rights of the parties, but only in case of family settlements.

To Thus, where *P* was tenant for life of an estate, with power to charge any sum not exceeding 4000*l.* thereon, remainder to *W* her son, in tail, remainder to the right heirs of her father, *she charged the estate accordingly, and then died* (*h*). *W* died without heirs and under age, leaving the interest in arrear. The plaintiff claimed the remainder as right heir of the father, insisting that as he was under no necessity of claiming as heir at law of *W*, the remainder in fee not having vested in possession in his *life*,

(*f*) *Winchelsea v. Norclosse*, 2 Chan. Rep. 170. 1 Eq. Ca. Abr. 262.

(*g*) *Sir John St. Alban's case*, Salk. 567.

(*h*) *Sergeeson v. Sealey*, Oct. 25, 1742. 2 Atk. 416. Cited 1 Vez. 477, 480, and confirmed.

the personal estate of *W* must be applied to pay the interest of the 4000*l.* during his life; but Lord *Hardwicke* was against the plaintiff on this ground, and decreed for him only on the rule above-mentioned.

But if tenant in tail discharge the interest of incumbrances, neither he nor any in his place will be permitted to set up *that* as a fact undone, but the remainder-man shall have the benefit of it (*i*); and none in the place of tenant in tail can insist on being a creditor upon that estate.

If there be baron and femme, and the husband take in a mortgage of an estate of which his wife is tenant in tail, and is in receipt of the rents; the husband will not be allowed interest on the mortgage during the life of his wife, on a bill exhibited by them in reversion after her death.

Thus, where *A* seised in tail of the equity of redemption of an estate (*k*), reversion in fee to the right heirs of her brother (which heirs were four sisters, *A* being one) levied a fine and made a conveyance thereof to *B*, by lease and release,

(*i*) *Amesbury v. Brown*, 1 Vez. 477. *Supra.* 242. 994.

(*k*) *Ibid.*

in consideration of money paid, and of paying 600*l.* due on the mortgage, and several legacies charged on the estate by the testator's will, under which she claimed. Afterwards, *she* intermarried with *B*, and previous to the marriage a settlement was made of this estate (which was the husband's under the prior purchase) to the husband for life, remainder to the wife for ninety-nine years, if she so long lived, remainder to the issue of the marriage, remainder over. After the marriage, the husband took an assignment of the mortgage, reciting that the premises had been devised to his wife, and also took a conveyance of the legal estate in fee to his own use. The wife died without issue, the husband continued in possession. Then the three co-heirs of the first testator, being entitled to the reversion in fee, brought a bill against *B* to redeem this estate, on payment of such part of the incumbrances thereon, as they were bound by law to discharge, insisting that they were not obliged to pay interest on the principal sum of these incumbrances, farther back than *from the death of the wife*; for *B* having taken in the mortgage, and received the profits, the interest during *her* life would be supposed to be paid; and so it was held by Lord Hardwicke, who said, that there was no deter-

determination *directly* on the point, therefore he must decide on general principles.

The wife was entitled herself to the reversion in fee of one-fourth part (*l*), the other three-fourths thereof belonging to the plaintiffs, the three co-heirs. She might by recovery have barred the reversion in fee in the *whole*; by fine she could bar it in *her own* fourth part. The taking the assignment of the mortgage by the husband, appeared from the recital to have been after the marriage, when the husband, if the settlement had been good, was seised in his *own* right for life; if not good, and the estate in tail continued, he was seised in right of *his wife*.

The question was, from what time interest was to be computed? He was of opinion, that the husband was not entitled to have any allowance of three-fourth parts of the interest during the time he was in possession, considering him in any light.

First, as a purchaser of this estate, by the assignment and conveyances made by the wife, when a *femme sole*, which was the true way;

(*l*) Amesbury *v.* Brown, 1 Vez. 477.

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but if that was out of the case, considering him as husband of tenant in tail, in possession of the estate, having taken in a mortgage thereof, the rule of equity would be, that his purchase would be defeated, but he would have the benefit of the mortgage, so taken in for satisfaction of his principal and interest, so far as they were not satisfied by the rents and profits of the estate; for in that case he must be considered as a mortgagee; if, as a mortgagee in possession, he must account for the rents and profits of the estate, and out of them the interest of the mortgage must be kept down; if he had purchased the reversion only, and taken an assignment of the mortgage, and never come into possession, and his purchase had been *then* defeated, and he evicted, he would have been entitled to have had his whole principal and interest; because he would have received nothing of the estate to keep down the interest.

So it would be on the foot of the purchase, taking it in the least favourable light for the plaintiffs; nor on the foot of the settlement would it mend the case; for as tenant for life under that settlement, he would be bound to keep down the interest, so would the wife have been if she had survived.

This

This brought his Lordship to the second way of considering it, namely, as if the purchase and settlement were out of the case, and looking upon the husband as having married tenant in tail of an estate, reversion in fee to strangers as to three-fourths, and being in possession in her right, taking in a preceding mortgage, binding that estate in tail, and afterwards continuing in possession, and receiving the rents and profits.

The question *then* would be, whether such an husband, after the death of his wife without issue, was entitled, notwithstanding the receipt of the profits, not to be redeemed without payment of the whole interest? In general, a court of equity endeavoured to make every part of the ownership of an estate bear part of the incumbrance; as if there were tenant for years, or life, subject to a mortgage, he must keep down the interest during his time. Suppose the tenant in tail had not married, but had taken an assignment of the mortgage to herself, and died, without barring the remainder in fee; taking the assignment to herself, she would have been considered as owner, and seized of an estate, which might have continued for ever;

ever; then perhaps the reversioner would have had stronger reason to say, that the whole estate was discharged of this mortgage, than on the other side, the representatives of tenant in tail would have to say, that they should be reimbursed the interest, incurred due during her life, because it might be considered as waiting upon the inheritance during that time; but it had not been carried so far as that. In the case of Mr. *Smith*, of *Wheale Hall*, in *Essex*, tenant in tail died, without barring, but had taken in a mortgage, which was considered, for the principal, as an incumbrance on the estate, but the question of interest did not arise there. No case had been cited, where such a tenant in tail, being in possession, his personal representative had been allowed to burthen the reversion in fee with the interest, incurred during his life, where he was owner both of the estate in possession and the charge; and it would be of very mischievous consequence, if it should be taken to be otherwise. Suppose she, after taking the mortgage, had married, and then died, leaving issue in tail; could her personal representatives come against the issue, to burthen the estate with the interest of that mortgage? It would be considered, as *taken in for the*

the *benefit* of the issue in tail. Cases of this kind depended on such a variety of circumstances, that it was impossible to draw the line. The tenant in tail was but tenant at will to the mortgagee, who might have brought an ejectment, turned her out of possession, and have received the rents and profits; *then* the profits would have been taken from the tenant in tail during her life. Suppose tenant in tail had afterwards brought a bill to redeem the mortgage, she must have redeemed on payment of principal, interest, and costs; should that burthen the estate of the remainder, with all the interest, which had been paid out of the rents and profits of that estate, in the hands of the mortgagee? None could tell when tenant in tail took the mortgage, or on what grounds it was done. The reason might be, that the mortgagee intended to have brought an ejectment, turned her out of possession, and taken the rents and profits to his own use: that did not appear, but there might be various reasons for taking in the mortgage; as, to prevent suits by foreclosure, or ejectment; and it would be making it liable to too great uncertainty, to say, that all the minute considerations of tenant in tail, taking an assignment of a mortgage,

should

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should be considered by the Court, upon a question between the personal representative of tenant in tail and the reversioner, after it came into possession. His lordship did not see how this differed from the case of interest paid by tenant in tail.

He was unwilling to make a precedent of the representatives of tenant in tail, calling back the interest of an incumbrance paid. It was right to let things stand as the courts found them, at the death of the tenant in tail. And though that was not strictly this case, this being a case of a mortgage taken in by husband of tenant in tail, seised in right of his wife, yet that would not make any difference; for the husband of tenant in tail, so seised, ought to be considered *exactly* in the same state as tenant in tail would be, and in no better; namely, taking the estate subject to all the incumbrances, actions, and remedies the mortgagee had therein, and to the right and estate of the reversioner, or remainder-man; consequently, as not having a right, after having received the profits of the estate during the life of the wife, to come against the remainder-man for satisfaction of the interest, which, naturally, the rents and profits were to answer.

This

This was not setting up a right to call upon the personal estate of tenant in tail, to satisfy arrears of interest, but setting up a right, in the representatives of tenant in tail, to bring a burthen on the reversion in fee, which had been discharged by tenant in tail himself; and as there was no precedent, he would not make one.

The guardian of an infant shall not by his neglect, in favour of the personal fund, subject the real estate to the discharge of interest on a mortgage, to which, if due diligence had been used, it had not been liable.

One having two sons, *R* and *T*(*t*), and being seized in fee of the manor of *B* (which manor was in mortgage) left two sons, one of which died at two years old, and the other at six years old; whereupon the estate descended to the uncle. The guardian of the son had neglected to discharge the interest of the mortgage, and the question was, whether he or the uncle should pay it? It was contended, that the guardian of the son, who was in possession, ought, out of the profits, to have kept down the interest of

(*t*) Jennings v Looks, 2 P. Will. 276.

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the mortgage, like the case, where a man mortgages land, and devises to *A* for life, remainder to *B* in fee; *A* must keep down the interest. *Sed per curiam*, that is not like the present case; for in the case cited, a third person, the remainder-man, and one not claiming under the tenant for life, would suffer by non-payment of interest; otherwise here, where the son was entitled to the whole fee simple, and might, when of age, charge or alien the whole. And if a devisee in fee of a mortgaged estate be of age, and suffers the interest to go greatly in arrear, his executor shall not be bound out of the rents to keep down the same; but this being in the case of an infant and a guardian, it would be a great inconvenience, if the guardian might ruin the inheritance (which it is his duty to preserve) by letting the interest run on, and this to increase the personal estate, of which, possibly, he may be in expectation. And the guardian or his executor, in case of his death, was decreed to answer the interest out of the profits.

If a first mortgagee *enter* (*u*), and afterwards suffer the mortgagor to take the profits, without requiring interest, the lands, in the hands of a second mortgagee, shall not be charged with

(*u*) *Bentham v. Haincourt*, Pre. Ch. 30.

any

any interest for that time ; that is, the interest of the first mortgagee shall not affect the lands, so as to keep out the second mortgagee longer than he would have been kept out, if the interest had been duly paid.

A prior incumbrancer (*x*) having notice of subsequent incumbrancers, shall not turn the interest into principal against them.

If a scrivener is intrusted with the custody of a mortgage-bond (*y*), he may receive the interest ; and though he fail, yet the mortgagee shall bear the losf : and so it will also be, in such case, if he receive the principal, and deliver up the bond ; for being intrusted with the security itself, it shall be presumed, that he was intrusted with a power over it, and with a power to receive the principal and interest ; the rather, because the giving up of the bond, upon the payment of the money, is a discharge thereof ; otherwise it is, if the obligee take away the bond, for, in that case, he hath no authority to receive the money.

(*x*) *Digby v. Craggs*, Amb. Rep. 612.

(*y*) *Whitlock v. Waltham*, Salk. 158. Sc. 1 Eq. Ca. Abr. 145. 4. Sc. 1 Vern. 150. *Ez Martin v. Kingly*, Pre. Ch. 209.

If

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If a scrivener is intrusted with the mortgage-deed (z), not the bond, he hath only an authority to receive the interest, but not the principal; because the giving up the deed is not sufficient to restore the estate, but there must be a re-conveyance; whereas the giving up a bond, is in law an extinguishment of the debt.

Although a scrivener hath neither the custody of the mortgage, or the bond (a), yet if the mortgagee agree that the mortgagor shall pay the interest to the scrivener, the interest may be well paid to him as long as the mortgagee lives,

If a mortgagee, in such case, die (b), and his executor come to the scrivener, and receive interest of him, and at his hands, that becomes due after the death of the mortgagee, this is a good payment; and if, after such receipt, the scrivener break, the mortgagor shall not bear the loss; for it is the mortgagee that trusts the scrivener, and the executor comes into the agreement, and thereby renews it, supposing it was determined by the death of the mortgagee;

(z) Whitlock v. Waltham, Salk. 158. Sc. 1 Eq. Ca. Abr. 145. 4. Sc. 1 Vern. 150. Et Martin v. Kingly, Pre. Ch. 209. (a) *Ibid.* (b) *Ibid.*

but

MONEY LENT ON MORTGAGE, &c. 1009

but it is rather an agreement than an authority, and does not die with the party.

A mortgagee (*c*) refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender.

But then notice of paying off the mortgage must have been given to the mortgagee (*d*) at least *six calendar months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very day* on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord *Hardwicke*, not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made.

And such a legal tender as will suspend the interest (*e*), when made to the mortgagee, will also bind his executors, or devisee.

(*c*) Sir John Austin *v.* Exrs. of Sir W. Dodwell, 1 Eq. Ca. Abr. 318, 9.

(*d*) Hix *v.* Ling, before Lord Hardwicke.

(*e*) Sir John Austin *v.* Exrs. of Sir W. Dodwell, *Supra*.

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But, in such case, it seems the plaintiff (*f*) ought to make oath, that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagor was not ready to pay it, in which case the interest must run on.

And, in general, a strict tender must be made (*g*), or the court cannot stop the interest; although cases may be where they would wish to do it; *that* of acting a more generous, kind part, if the mortgagee had taken it, is not the rule that the court is to go by.

And where there was an open account between the mortgagor and the mortgagee (*h*), and several tenders were made of the mortgage-money, deducting the balance; it was held that the interest should not stop upon proposals to deduct upon an open account of the other side.

It was held, where a mortgagor tendered a bank-note to the mortgagee, for him to take

(*f*) *Sutton v. Rodd*, 2 Ch. Ca. 206. *Gyles v. Hall*, 2 P. Will. 378, *infra*.

(*g*) 2 Vez. 372.

(*h*) *Garforth v. Bradley*, 2 Vez. 678.

thereout

thereout what was *then* due for principal and interest (*i.*), and the mortgagor offered, if he objected to the legality of the tender being in a bank-bill, to turn it presently into money; that although this was not, strictly speaking, a legal tender, yet it being proved that the mortgagor offered to turn it into money, that made it good.

It is necessary to observe, on this subject of tendering bank-notes, that it has never yet been determined, that a tender of bank-notes is *at all events*, a good tender; and perhaps, there may be great policy in evading such a decision, as the greatest credit such paper can acquire, is the voluntary and universal receipt of it as cash in all parts of the world. But although courts of justice have not yet decided bank notes to be a legal tender, the Court of King's Bench, in conformity with the opinion of mankind, have held, that if such notes are presented in payment, and no objection made to the receipt, on that account they are a *good tender*.

(*i.*) Sir John Austin *v.* Exrs. of Dodwell, 1 Eq. Ca. Abr. 318. 9. Hill, 1729. 3 Bacon. Abr. 659. *Supra.*

This question occurred in the case of *Wright and Reed* (*j*), which arose on an objection taken to the memorial of an annuity, under the 17th *Geo. cap. 26*, upon the ground, that part of the consideration was in money, and the rest in *bank-notes* of the Bank of *England*, whereas the whole consideration was *described* as *money* in the memorial. But the Court were unanimously of opinion, that bank-notes were to all intents money, if accepted *without objection* as such, and on that ground, held that the memorial was good.

But Mr. Justice *Buller* observed, that although bank-notes were considered in this light in the Court of King's Bench, yet in a case on the other side of the Hall, the Lord Chancellor once suggested a doubt, whether these kind of notes were money; therefore it is most prudent, in making a tender of them to a mortgagee, to offer to turn them into cash, which, if not required, clearly gives validity to the tender; for as the consequence of a refusal, if the tender be legal, is *penal* to the mortgagee, a Court of Equity would be in-

(*j*) *Wright v. Reed*, 3 Term Rep. 554. *Et vid. Miller v. Race*, 1 Burr. 452.

clined

clined to seize upon any omission, by which a mortgagee, so circumstanced, might escape from the rigor of the law.

A tender must be made by a person actually interested; and accordingly, it was said by *Croke* to have been adjudged, Trin. 27 Eliz. that, where one tendered money upon a mortgage for an infant, who was not guardian, nor was to have any interest in the land, it was adjudged a void tender (*k*).

The above case is reported more at large in *Owen* (*l*), by the name of *Watkins* and *Ashwick*, and is thus stated: A man made a feoffment on condition, that if he, his heirs or executors, did pay one hundred pounds before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested *IS*, that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. *Clinch* said, that if the jury had found, that the son was of the age of seventeen years, the payment had been good. But by *Wray*, if a bond be upon condition, that the obligor or his heirs shall

(*k*) *Watkins v. Ashwicke*, Cro. Eliz. 132,

(*l*) *Owen*, 137.

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pay 100*l.* and the obligor dies, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards, all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore, they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years.

The money being a sum in gross (*m*), and collateral to the title of the land, the mortgagor must tender it to the *person* of the mortgagee, and it is not sufficient for him to tender it *upon the land*.

But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee (*n*), or be in any other place but in that comprised in the indenture, or *there* longer than the time specified therein.

(*m*) Co. Litt. 210. b. 2 Eq. Ca. Abr. 603. 34.

(*n*) Co. Litt. 211. b. 212.

And

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off.

Thus (*o*), where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at *Lincoln's Inn Hall*, at a day and hour appointed therein, which accordingly was done; it was objected, that *Lincoln's Inn Hall* was not named, in the proviso in the mortgage-deed, as the place for payment, and therefore, that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to *Oxford*, where the mortgagee lived.

In some cases, a tender at the house of the mortgagee will be sufficient (*p*). Thus, where there was a mortgage, and the mortgagor af-

(*o*) *Gyles v. Hall*, 2 P. Will. Rep. 378. *Supra*.

(*p*) *Manning v. Burges*, 1 Ch. Ca. 29.

terwards meeting the mortgagee, said to him, I have monies now, I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the Court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness.

And a like determination was made, in the case of *Peckham and Legay* (q).

But, if there be a deed of assignment presented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and shall have reasonable time allowed him so to do before the interest shall stop.

(q) *Manning v. Burges*, 1 Ch. Ca. 29.

Thus,

Thus (*r*), where a bill was brought, in *May*, 1742, to redeem a mortgage, in which the plaintiff insisted upon a redemption, on paying the principal money only, for that the interest ought to determine in *February*, 1741, because he had given six months notice to pay it off, and had, on that day, tendered the principal and interest, with a deed of assignment, but the defendant absolutely refused to take the money; the defendant swore, that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, there being covenants therein on his part, upon which, as he was not of the profession of the law, it was reasonable he should consult his attorney, whether they were such as he might safely execute. And the Lord Chancellor said, that the plaintiff, not having sent a draught of the assignment, to the defendant any time before the money was tendered, as he ought to have done, was in the wrong; for where there were covenants on the part of the mortgagee, it was very reasonable that he should have some time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity

(*r*) *Wiltshire v. Smith*, 3 Atk. 90.

to

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to advise upon it, and should have appointed a time to pay the money, after the defendant had had sufficient time to consider it. And his Lordship decreed the mortgage-money, with interest, to be paid within six months, or otherwise the plaintiff's bill to stand dismissed.

So, if there be a controversy, to whom the equity of redemption belongs, no assignment can be made until that point is settled (*s*) ; therefore the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it.

The rate of interest, originally reserved upon a mortgage, may be altered at any time by a parol agreement, without writing; notwithstanding the rule, that a parol agreement ought not to be admitted, to contradict the terms of an agreement contained in a deed, or any other agreement in writing; for such subsequent transaction will not be considered in law as a *contradiction*, or *alteration*, of the original agreement, but as a *new subsequent parol* agreement; and nothing is more clear in law, than that a written agreement may be waved in part, or in the whole, or be varied in the terms of it, by

(*s*) Sharpnell v. Blake, 2 Eq. Ca. Abr. 603. 34.
a subsequent

a subsequent parol agreement, made upon a new and good consideration, if the subject matter of the latter agreement doth not require that it should be in writing.

Thus, where Lord *Milton* (*t*), being possessed, under a conveyance from his father, of divers mortgaged premises, and all the securities for the same, and entitled to all the money due thereon, filed his bill in the Court of Exchequer in *Ireland*, in *June*, 1764, against *Moore Edgeworth* and *Damer Edgeworth*, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cause, and for an account; and that the money which should appear due thereon might be paid the plaintiff by a short day, or that the defendants might be foreclosed, and the mortgaged premises sold, for payment of what should appear due.

The defendants, by their answer to this bill, admitted most of the matters therein stated; but insisted upon the benefit of an agreement, which they alledged had been made between the plaintiff's father, *John Damer*, and the

(*t*) *Lord Milton v. Moore Edgeworth & Damer Edgeworth, infants*, 6 Brown's Ca. Parl. 580.

father of the defendants, for reducing the interest of the said mortgages, which, by the deed, was originally at 8 per cent. to 6 per cent.

Issue being joined in the cause, several witnesses were examined; and the same came on to be heard in November, 1771; when (upon reading an answer put in by the said *John Damer*, in 1758, to a bill, filed against him by the defendant's father in 1757, whereby the former admitted, that, pending a former suit, the said defendant's father has told the said *John Damer*, "That the debts, affecting the estates mortgaged, were so great, that if *John Damer* did not make an abatement in the interest of the money due to him, he would have little benefit in case he succeeded in the said suit," and that *Damer* then said, "that if that should be the case, he would leave any reasonable abatement to his friend *Ambrose Harding*." Whereby it appeared, that such conversation had passed between them; and that the said *Ambrose Harding* understood, that *Damer* had agreed to accept of 6*l. per cent.* interest upon the money so due to him on the said securities; and also upon reading other evidence) the Court made an order, directing

recting an issue to be tried at the next assizes,
“ whether there was any, and what agreement
“ between *John Damer*, Esq. deceased, and
“ *Packington Edgeworth*, deceased, at any,
“ and at what time, for any, and what abate-
“ ment of interest, on the principal sums due
“ to the said *John Damer*? ”

From this order, Lord *Milton* appealed to the House of Lords, and the principal objection urged by him against directing such issue, was, that considering the state of the evidence before the Court, it was unjust to direct an issue; because the answer of Mr. *Damer*, which was read by the defendants at the hearing, denied any agreement between him and *Packington Edgeworth*, to reduce the rate of interest; and this denial, being set in opposition to any conclusion drawn from *Harding's* evidence, took away all ground for the Court's interposing; whereas, by directing an issue, upon the trial of which Mr. *Damer's* answer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cause.

But

But it was adjudged, that the order should be affirmed, with this addition, *viz.* that the plaintiff should be at liberty, at such trial, to read the answer of *Damer*.

Interest due upon a mortgage of money which is in settlement (*u*), will not be considered as in the nature of rent, and consequently go with the mortgage; but if the tenant, under the settlement, die in the broken part of the quarter or half year, the interest will be apportioned; and what is due from the last day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the residue to him in remainder.

The reason is (*x*), that interest increases on a mortgage from day to day; and the mortgagor, whenever he pays the principal and interest, must pay the interest up to the day of payment.

In this (*y*), a mortgage likewise differs from stock, for dividends upon stock are by the legislature made payable only half-yearly, and are

(*u*) *Edwards v. Countess of Warwick*, 2 P. Will. 171.

(*x*) *Wilson v. Harman*, 2 Vez. 672.

(*y*) *Ibid.*

in nature of rents, and consequently not liable to apportionment.

On the statute 12 *Ann.*, *stat.* 2, *cap.* 16, *sec.* 1 (z), which enacts "that all bonds and assurances for the payment of any principal, or money to be lent upon usury, whereupon there shall be reserved or *taken* above five in the hundred, shall be utterly void;" parol evidence has been admitted, to shew *usurious* interest *taken* by a mortgagee, though there was none reserved upon the face of the deed itself.

(z) 3 Atk. 154.

C A P.

CAP. XX.

OF THE METHOD OF ACCOUNTING.

THE land upon a mortgage being generally left in the management of the mortgagor, and the conveyance thereof rather looked upon as a collateral security for the due payment of the money lent, and interest, than as an actual alienation ; the mortgagee is considered as having no right to meddle with the rents and profits, until after he has taken possession thereof (a). There is no instance of the mortgagor being obliged by the Court to account to the mortgagee for the rents and profits for any of the years back, during which he hath been in

(a) *Vid. Mois v. Gallimore, supra. Et Mead v. Lord Orrery et al'. 3 Atk. 244. 2 Ibid. 107.*

posseſſ-

possession ; for if the interest be not paid, the mortgagee ought to take the legal remedy to get the possession himself.

This principle is so strictly adhered to, that the Court would not dispense with it even in the case of a security upon an estate for lives, which was become insufficient (*b*).

If the mortgagee enters upon and takes possession of the estate (*c*), he becomes in the nature of a bailiff to the mortgagor, and will be subject to account for the profits.

So, if the mortgagee be put into immediate possession, and the profits of the estate evidently exceed the amount of the interest, the mortgagor may exhibit his bill for an account.

Thus, where *M* seised of an estate for life (*d*), joined with her son, who had the inheritance, in a conveyance by a deed that was absolute of lands of *4l. per annum*. and a profit out of some coal-mines, which, *communibus annis*, were worth nine pounds, to secure ninety pounds ; and the vendee was

(*b*) *Colman v. Duke of St. Alban's*, 3 Vez. Jun. 25.

(*c*) *Gould v. Tancred*, 2 Atk. 534.

(*d*) *Fulthrope v. Foster*, 1 Vern. 476.

immediately put into possession, but on a proviso, that if the son should pay the money at the end of ten years, the vendee should re-convey to him. On a bill brought to redeem, the only question was, whether the defendant should retain the profits in lieu of the interest, or should account for what he had received out of the estate?

It was insisted for the vendee, that the mother, who had parted with the estate for life, had the most reason to complain, and that she was content the defendant should have the profits in lieu of the interest; that the son had a good bargain of it, for he had got to himself his mother's estate for life, and that it was in the nature of a *Welsh* mortgage, where the mortgagee is put into possession immediately, under a proviso to have a re-conveyance on payment of the principal money, in which case the profits always go against the interest; that this case was stronger, by reason that here the profits arising out of the coal-mines were more uncertain than the profits of lands. But the Master of the Rolls was of opinion, that the profits being $13l.$ *per annum*, it was altogether unjust and unreasonable that the same should go in lieu of the interest of $90l.$; and that,

even

even in *Welsh* mortgages, if the value was excessive, the Court would decree an account, notwithstanding there might be an agreement for retaining the profits against the interest ; and a re-conveyance was decreed on payment of what should appear due, discounting the profits received.

Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care and pains, (*e*) ; but if they employ a skilful bailiff, they will be allowed such sums as they have paid him ; for a man is not bound to be his own bailiff.

And though there be a private agreement between the mortgagee and the mortgagor (*f*), for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the Court will not carry it into execution, for equity will not allow him any more than his principal and interest.

If a mortgagee in possession assign over his mortgage, without assent of the mortgagor, to

(*e*) *Bonithon v. Hockmore*, 1 Vern. 316, 3 Atk. 518.

(*f*) *French v. Baron*, 2 Atk. 120.

an insolvent person, the mortgagee will be bound to answer the profits, both before and after the assignment, though assigned only for his own debt (*g*) ; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to an insolvent person. But *quære*, if the mortgagor conceal himself, so that he cannot be served with a *subpæna* to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment ?

A mortgagee will not be obliged to account according to the value of the lands (*h*), viz. he will not be bound by any proof that the land was worth so much, unless it can likewise be proved, that he actually made that sum of it, or might have done, had he not been guilty of fraud or wilful default ; as, if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it ; for it is the *laches* of the mortgagor that he lets the lands lapse into the hands of the mortgagee

(*g*) 1 Eq. Ca. Abr. 328. 2. 2 Ch. Ca. 3. 3 Bacon's Abr. 658.

(*h*) Anonymous, 1 Vern. 45. 1 Ch. Ca. 258. 1 Eq. Ca. Abr. 328. 1 Vern. 476. 3 Bacon's Abr. 657. 8.

by the non-payment of the money, and when it doth, he is only a bailiff for what he doth actually receive, but is not bound to the trouble and pains of making the most of what is another's.

If the mortgagor make proof that the estate was let at *such* a price, whilst in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary, which it is in his power to do, as being let by him (*i*).

But, if the mortgagee enter upon the estate, and thereby keep other creditors out, he will be charged with all the profits he hath, or might have received after this entry (*k*). Thus, where a mortgagee had obtained judgment in ejectment, and entered on the mortgaged estates, and thereby prevented other creditors that had subsequent securities from entering, and yet permitted the mortgagor to take the profits; on bill by the other creditors to redeem him, the Court ordered, that the mortgagee should

(*i*) *Blacklock v. Barnes*, Sel. Ca. Ch. 53.

(*k*) *Coppring v. Cooke*, 1 Vern. 270. *Bentham v. Haincourt*, Pre. Ch. 30. 3 Bacon's Abr. 658.

be charged with all the profits he had, or might have received after his entry.

But he will not be obliged to account for profits which he received, or might have received previous to the commencement and notice of such subsequent incumbrances; for until then his negligence doth no injury (*l*). Thus, where a mortgage was made of leasehold estates, and the mortgagee having possession by attornment of tenants, had permitted the mortgagor to receive the rents, and the plaintiff, who was the second mortgagee, was on his bill admitted to a redemption, on payment of what should appear due on the first mortgage; the question was, whether the mortgagee, having had possession, ought not to be charged with the rent, which he might have received but had neglected? *Et per curiam*, he ought to be charged with the rent, by whomsoever it has been received, after the second mortgage made; but what has been received before the second mortgage, he ought not to be charged with.

And, if a mortgagee permit the mortgagor to make use of his incumbrance to keep out

(*l*) *Maddock v. Wren*, 2 Rep. Ch. 109.

other

other creditors, he will be charged with the profits from the time that they would have had a remedy, had it not been for his interposition; for equity will not suffer a man to make use of his securities to protect a debtor from the just demands of his creditors (*m*). Thus, where one having made a mortgage of his estate, became a bankrupt, and the assignees of the statute brought an ejectment for the recovery of the lands comprised in the mortgage; the mortgagee having refused to enter, and suffered the bankrupt to take the profits, and to fence against the assignees with the mortgage, it was decreed, that he should be charged with the profits from the time of the ejectment delivered.

Nor shall a mortgagee, being in combination with the tenant in possession, who refuses to pay his rent, suffer the tenant to make use of his mortgage to cover himself from legal process taken out by the mortgagor, to evict him out of possession.

Thus, where *G*, who was a mortgagee under *B*, had brought an ejectment and recovered

(*m*) Chapman *v.* Tanner, 1 Vern. 267. 3 Bacon's Abr. 658.

judgment against an estate, of which *H* was in possession, by virtue of a lease for three years, but for which *H* paid no rent, being insolvent (*n*) ; and *G* being in combination with *H* (who was accountable to *B* for eighteen thousand pounds) refused to take out execution, and *B* could not eject *H* by reason of *G*'s judgment ; it was moved, that *G* might be compelled to take out execution, and receive the profits in discharge of his debt. But it was objected on his part, that no order had ever been made to compel a mortgagee to take out execution, whether he would or not ; for it might involve him in a suit, and would make him, *nolens volens*, bailiff to the mortgagor ; whereas, a mortgagee, who acted discreetly, would not enter before he had foreclosed the equity of redemption. To which the counsel for the mortgagor replied, that they would not compel *G* to enter ; but, in case he did not chuse to receive the profits, they desired the rent might be brought into Court, which the Court held to be reasonable ; and it was ordered, that unless *G* took out execution before the end of the term, he should be answerable for the profits, as in case of wilful default.

(*n*) Duke of Buckingham *v.* Sir R. Gayer, 1 Vern.
258.

It was held by the Court to be the daily practice, that if a mortgagee assign over his mortgage, yet he must be made a party in a bill of redemption, that he may account for what profits he hath received in his time (*o*).

Where there are several mortgages, an account stated between the first mortgagee and the mortgagor will bind the rest, if there be no fraud or collusion (*p*). Thus, where the mortgagee sued the mortgagor to pay, or be foreclosed of redemption, an account was directed and settled before a Master; and then a subsequent mortgagee, whose mortgage was made before the former bill was exhibited, sued the first mortgagee and mortgagor to have a new account, supposing the former account to be false, and made by consent and fraud, but did not insist on any particulars, as in such case he ought to have done. The Lord Chancellor declared, that the account should bind the second mortgagee, without farther examination, if the fraud and collusion were answered; for the first mortgagee did all that he could, and

(*o*) Anne, in the Dutchy, 2 Eq. Ca. Abr. 594, 3.

(*p*) Needler *v.* Deeble, 1 Ch. Ca. 299. 2 Ch. Ca. 32.

3 Bacon's Abr. 659. 3 Rep. Ch. 47, 8. 1 Eq. Ca. Abr. 12. 7.

was not bound to seek after the second mortgagee ; for then it would be in the power of the mortgagor to make the assurance uncertain and endless to the mortgagee. It should suffice to deny the fraud and collusion.

But the account between the mortgagee and assignee will not conclude the mortgagor (*q*) ; but it will be referred to the Master to see what was really due, on the making the assignment, and what money was *actually* paid thereon.

An account on a bill to redeem or foreclose (*r*), taken in a cause, in which tenant for life of the equity of redemption is party, and when no other person is entitled, will be binding on any contingent remainder man, when his title afterwards vests ; nor shall he open it, unless fraud or errors are shewn therein ; for thereby accounts upon mortgages, to which all who can claim the equity of redemption are parties, would often be infinite. But if a reasonable objection be made against such account, the Court will so far open it. But the Court will only give leave to surcharge and falsify the account ; which often happens upon

(*q*) 1 Ch. Ca. 68.

(*r*) 1 Vez. 164.

set-

settlements, where there is tenant for life with limitations in remainder, upon a bill for an account, when none but tenant for life is in being; a child afterwards coming *in esse*, shall, if no fraud, only have liberty to surcharge and falsify.

And where a man made a mortgage, and, after a forfeiture for non-payment of the mortgage money, married and conveyed the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure; and afterwards became a bankrupt (*s*); and the commissioners assigned the equity of redemption in trust for the creditors, and the assignees stated an account with the mortgagee: The jointress brought her bill to be relieved against this account, alledging, that it was not fairly stated, but that the assignees by combination with the mortgagee had allowed more money than was really due on the mortgage; the defendant pleaded this stated account. *Et per* Lord Keeper, the assignees stand in the place of the husband, and the account by them stated ought to be as conclusive, as if it had been stated with the husband; and the bill is

(*s*) *Knight v. Bamfield, et al.* 1 Vern. 179.

not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned particular errors in the account.

An assignee, after several assignments, will not be obliged to account for profits before his own time (*t*). Thus, where on a bill to redeem a mortgage made in 1632, it was insisted by the defendant, that he came in as an assignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper said, that as there had been no stint put to the time at which a mortgage was to be redeemed, the defendant should account; but, in regard he came in at an old hand, it should not be taken, but so far only as went in discount of his money, *not* for the surplusage.

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was dismissed in 1641 (*u*); afterwards, he who had the extent, by virtue of the dismission, sold the premises to the defendant, and the plaintiff having since bought the equity

(*t*) Pearson *v.* Pulley, 1 Ch. Ca. 102.

(*u*) Cloberry *v.* Lymonds, 2 Ch. Rep. 392.

of redemption, came to redeem; the Court, notwithstanding the dismission and length of time, ordered an account from the purchase, not from any time before, but till then the profits to go against the interest.

Where a mortgagor, having been defeated, after a special verdict and great agitation at law, in his endeavour to overthrow the mortgage by a supposed entail, exhibited a bill to redeem (*x*); the mortgagee having sworn, that he paid 120*l.* in defending his mortgage at law, although he had but 60*l.* costs allowed him there; the Court determined that he should not be held down to the taxation at law, but should, upon the account, be allowed all that he had laid out or expended; and the mortgagee, fearing his mortgage would have been defeated at law, having got administration, as principal creditor, in the Spiritual Court he was allowed the costs expended *there* also.

An account taken by a Master upon a decree in a bill of revivor, brought by an infant heir, will bind the heir, unless he can surcharge or falsify (*y*).

(*x*) *Ramsden v. Langley*, 2 Vern. 536.

(*y*) *Badham v. Odell*, 4 Brown's Parl. Ca. 447. *Sc. supra.*

Where

Where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the principal (z). But as this is often attended with great hardships to mortgagees (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to an account) the Master is not obliged, on every small excess of interest, to apply it to sink the principal; nor has the Court ever laid it down as an invariable rule, that the Master must always, in taking such account, make annual rests.

It is the constant practice of the Court of Chancery, in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it had not been for their own default (a); and yet if the person, de-

(z) Gould *v.* Tancred, 2 Atk. 534.

(a) Bulstrode *v.* Bradley, 3 Atk. 582.

creed to account, receive any thing subsequent to the decree, it is enquirable before the Master, and the defendants in such case must bring such sums so received to account.

CAP. XXI.

OF FORECLOSURE.

THE same principle of *substantial justice*, which induced courts of equity to interfere on behalf of a mortgagor, who had forfeited his estate (by not performing the condition annexed to the conveyance thereof), and to relieve him from the consequences that in law followed such neglect, rendered necessary the establishment of rules, by complying with which the mortgagee might compel the mortgagor to perform the contract on his part; namely, the repayment of the money borrowed, with interest. This may be done, either by procuring a decree for sale of the estate, if reversionary, or, if in possession, by calling upon the mortgagor in Court to redeem

deem his estate presently, or, in default of so doing, to be for ever foreclosed, that is, barred and utterly excluded his equity of redemption without recal, unless upon *special* circumstances (*a*).

Where the mortgage is of money in the stocks, or the like, no decree of foreclosure is necessary (*b*); therefore, where a bill was brought in 1729 by the plaintiff, to redeem the sum of 2500*l.* East-India stock, transferred to the defendant in 1708, for the securing the sum of 2000*l.* and interest; the defendant having executed a defeazance, whereby he obliged himself to transfer the stock on payment of the 2000*l.* and interest, on the 2d of *July* following the mortgage of it. The Lord Chancellor said, this was a very plain case for the defendant. In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of stock it was not necessary, and therefore a strong reason for the mortgagor's departing from the right.

And the stock having increased in value, which is a mere accident, will be no inducement to a Court of Equity to decree a redemption (*c*).

(*a*) 2 Inst. 198.

(*b*) Lockwood, *et al.* v. Ewer, 2 Atk. 303.

(*c*) *Ibid.*

But, it is to be observed on the last-mentioned case, that the period of time had elapsed between the mortgage and the bill to redeem, after which, it will be shewn hereafter, a Court of Equity refuses its aid to a mortgagor, unless under special circumstances.

The mortgagor or his heir are necessary parties to a bill to foreclose by the mortgagee (*d*).

If there be several mortgagees of an entire thing mortgaged, they must all be made parties to the bill of foreclosure. This was held to be necessary in the case of *Lowe v. Morgan* (*e*), where a share of Covent-Garden Theatre having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Register finding some difficulty in drawing up the decree, applied to the Lord Chancellor, who said it was a new case in respect to their being joint-tenants, and that it would be impossible for one to fore-

(*d*) *Howes v. Wadham*, Ridgw. Rep. 199.

(*e*) *Lowe v. Morgan*, 1 Brown's Rep. Ch. 368.

close,

close, without making the other two parties. The cause therefore stood over for that purpose.

But where a trustee laid out the money of different persons on a mortgage, a foreclosure was permitted by one *ceſſui que truſt*, as to his share on a bill filed by him against the mortgagors and co-mortgagees (*f*).

So, if there be several derivative mortgagees, they must all be made parties to a bill to foreclose, in order that there may not be a multiplicity of suits.

In a bill to foreclose, the case was (*g*), *A* made a mortgage for a term of five hundred years, for securing three hundred and fifty pounds and interest to *B*, who, so long before as 1705, assigned the term to *C*, redeemable by himself, on the payment of 300*l*. *B* died, *C* brought a bill against *A* to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of *B*, the original mortgagee, parties. *Et per curiam*, here is plainly a want of proper parties; *B* had a right to redeem *C*; and to prevent another

(*f*) Montgomerie v. Marquis of Bath, 3 Vez. Jun. 560.

(*g*) Hobart v. Abbot, 2 P. Will. 643. Mich. 1731.

account, as to what is due upon the original mortgage, his representatives ought to be before the Court.

Courts of equity will never decree a foreclosure, until the period limited for payment of the money be passed, and the estate, in consequence thereof, forfeited to the mortgagee (*h*); for it cannot shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

On a bill for foreclosure, the title of the mortgagee cannot be investigated; but he will be left to pursue legal means to establish it.

And, therefore, where a mortgagee sued to have his money (*i*), or that the defendant should be barred of his equity of redemption; it happened that, by subsequent orders, possession was directed to be given to the mortgagee, and contempt prosecuted for not delivering it accordingly; upon which, the heir of the mortgagor set forth a title in his examination, that

(*b*) Bonham v. Newcomb, 2 Vent. 365. 1 Vern. 232.
Sc. supra.

(*i*) Anonymous, 2 Ch. Ca. 244.

the*

the mortgagee would have debated, but he was not admitted; it being insisted, that the course of the Court, upon such a bill, was, and the Court could go no farther than, to take away the equity of redemption, and leave the mortgagee to such title as he had, at law, but could not amend it; which the Lord Chancellor agreed to, and discharged the contempt.

A mortgagee may bring an ejectment, at law, at the same time that he hath a bill of foreclosure depending (*k*); for he will not be prevented from pursuing *all* his remedies for the recovery of his debt.

But special circumstances may arise, which will take the case out of the common rule, and induce the Court to grant an injunction, to stay proceedings upon the ejectment.

Thus, where a bill was brought by the plaintiff against the defendant (*l*), for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother, and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged to him; the Court, because

(*k*) *Booth v. Booth*, 2 Atk. 344.

(*l*) *Ibid.*

he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem.

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the Court may refuse such decree (*m*). Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him to protect his incumbrance; the Court, on a bill filed by him to foreclose the children claiming under the settlement, refused to do so; saying, that if he might be suffered to protect himself by getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

A mortgagee of a copyhold estate, who is not in possession, may exhibit his bill against a mortgagor, before admittance, for a decree of foreclosure (*n*); and, after he has obtained such

(*m*) *Saunders v. Dehew*, 2 Vern. 271. *Sc. supra.*

(*n*) *Sutton v. Stone, et al.* 2 Atk. 101.

a decree,

a decree, may bring his ejectment for the possession of the mortgaged premises.

Where a mortgagee is made party to a bill (*o*), praying relief is the same thing as praying to redeem, for redemption is the proper relief; and if, upon a reference to a Master to see what is due for principal, interest, and costs, the plaintiff does not redeem the mortgagee, the Court will, on his application, dismiss the bill, as against him, which is equivalent to decreeing a foreclosure.

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money (*p*), or, to be decreed to make farther assurance, and be foreclosed of redemption; it is a good cause of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party.

And, since it has been determined that (*q*), in all mortgages, the money belongs to the executor or administrator, and not to the heir; if

(*o*) *Cholmley v. Countess Dowager of Oxford*, 2 Atk. 267.

(*p*) *Freak v. Hearsey*, 1 Ch. Ca. 51.

(*q*) *Meeker v. Tanton*, 2 Ch. Ca. 29.

it comes out, upon the hearing, that the executor or administrator are not parties, the plaintiff in the cause cannot be permitted to proceed.

The executor of the mortgagor need not be party (*r*) ; for where, on a bill brought by a mortgagee against the mortgagor to foreclose, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Master of the Rolls and the Register, that there was no necessity to make him party; because, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, *viz.* the heir; and the course was so; neither was the mortgagee any ways bound to intermeddle with the personal estate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it.

But a foreclosure, obtained on a bill exhibited by the heir at law, will be binding (*s*), although the executor or administrator be not a

(*r*) *Duncomb v. Hansley*, 3 P. Will. 333. in notes.

(*s*) *Clarkfon v. Bowyer, et cont.* 2 Vern. 66.

party;

party; for if the executor or administrator of the mortgagee should afterwards come against the heir of the mortgagee, to have the benefit of the mortgage, the heir, in case the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himself.

Where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party (*t*); upon a bill, by the executor, against the heir of the mortgagee and against the mortgagor, the land was decreed to the executor.

But it is observable that, in the last case, the heir made no offer to pay the mortgage-money to the executor, which is the basis of the resolution in the former case.

A plea of a decree for foreclosure in the common form, with an averment of non-payment of the money, &c. but no final order for foreclosure, on appeal from Lord *King*, was held not to be good (*u*); for, although such plea and length of time might be a good defence, yet,

(*t*) *Globe et Ux. v. E. of Carlisle*, cited in the last case.

(*u*) *Senhouse v. Earl*, 2 Vez. 450.

as a plea, it could not stand for want of a final order.

On a decree to foreclose at a period certain, the computation of time must be according to calendar months, and not according to lunar ones (*x*).

A decree to foreclose tenant in tail of an equity of redemption, will bind his issue, and also those in remainder, who are no parties to the mortgage; because the equity of redemption is a right set up *only* in a Court of Equity, and may be there extinguished.

Thus where, in *May 1613*, *R*, on his marriage with *D* his wife, settled lands on himself for life, remainder to *D* for life, remainder to the heirs male of his own body, and then died, having issue *C*, his first, and *H*, his second son (*y*). *D*, his widow, married with *G*, and they entered on the lands in question as *D*'s jointure. *C* the son, in *November 1638*, for £*1000*. conveyed these lands by deed, fine, and recovery, to *G* and his wife, to the use of *D*

(*x*) Anonymous, Barnard, 324. *Sc. 2 Eq. Ca. Abr.* 605, pl. 38.

(*y*) *Chaumont Roscarrick v. Barton*, 1 Ch. Ca. 217.
for

for life, remainder to the use of *C* and his heirs, till he failed to pay several sums, amounting to 800*l.* at several days, and, after default of payment of any of these sums, to *G* and his heirs. Afterwards, in 1639, *C*, on his own marriage, settled these lands on himself for life, remainder to *M* his wife for life, remainder to his first and other sons in tail, *remainder to H in tail*. In 1650, *G*, with the consent of *C*, assigned his estate, which was for the security of the 800*l.* and was forfeited, to *B*. In 1656, *B* obtained a decree to foreclose, unless *C* paid him what was due; *C* died without issue male; *D* lived till 1668; then *H* exhibited his bill to redeem, alledging that he, being no party to the decree, and *C* but tenant for life, it could not bind *him*.

But the Court were of opinion, that *H* ought not to be admitted to redeem; and Lord Chief Justice *Hale* said, he was of opinion, that there was no colour for such a decree; that it had gone far enough, and that he would go no farther than precedents in the matter of equity of redemption, which had too much favour already; there should be no decree for *H* in respect of the antiquity, for if he would redeem, he must come in time. It was but just to foreclose for not coming in time; and a decree to foreclose

A

tenant

tenant in tail, should bind his issue in an equity of redemption. The estate moved from *C* to *B*, and not from *H*, and *C* was the visible possessor and owner. It was a great sore, that mortgagees were but bailiffs; and the limitation to *H* was but voluntary, so his pretence was not to be supported against a purchaser, for so a mortgagee was; here the purchase was made absolute by the decree, and if there were divers remainder-men of the equity, there would be no occasion to make them *all* parties.

And a release of the equity of redemption by tenant in tail, under a subsequent settlement, after a decree for an account and foreclosure, is tantamount to an absolute foreclosure by order.

Thus (*z*), where *H* being seised in fee, mortgaged for years, and afterwards, in 1734, made his will, and devised his estate to his son and his heirs, subject to an annuity to his wife for life, and to the incumbrances upon the estate; and in case his son should die without issue, to be divided amongst his three daughters, or such of them as should be living at the death of his son; and if his son and daughters should all die without issue, then to his wife for life,

(*z*) Reynoldson v. Perkins, Amb. Rep. 564.
remainder

remainder to his own right heirs. A bill was brought by *P*, as assignee of the original mortgagee, against the widow of the mortgagor, and her son, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cause was heard, and a decree made for an account and foreclosure, unless redeemed by the mother or son. The account was taken before the Master, and the time for redemption being several times enlarged, and at last elapsed, the son, having attained 21, released the equity of redemption; so that the foreclosure was not made absolute against him, but was made absolute against the wife. The son afterwards died without issue, and *R* having bought the daughters' interest for a trifle, in 1765, filed a bill to redeem. But the *Lord Chancellor* was clear of opinion, that *P* was not entitled to redemption. That the first tenant in tail being a party to the foreclosure was sufficient. That he sustained the interest of every body, and those in remainder were considered as cyphers. That it would be very inconvenient if the remaindermen were necessarily to be parties. There might never be an absolute foreclosure. The account would be endless, and the foreclosure would be open to every contingent remainder-man. That
nobody

nobody would lend money upon such terms. That the release in this case, was equal to an absolute foreclosure by order. That the accounts were taken, and the time for redemption elapsed, and that this case was not so strong as that of *Roscarrick and Barton* (*a*).

But it was observed, in the preceding case, that the length of time elapsed after the receipt and foreclosure was an additional circumstance against the relief prayed, and that the plaintiff appeared to have purchased the daughters' interest for a trifle, and was trying an experiment.

But, although in such case, where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure (*b*), yet if there be an express estate for life, the remainder-man ought to be a party.

If there be many incumbrancers, some of whom are not made parties to a bill to foreclose (*c*), the plaintiff, in the bill, may notwithstanding foreclose such defendants as he has brought before the Court.

(*a*) 1 Chan. Ca. 217.

(*b*) Sutton *v.* Stone, 2 Atk. 101.

(*c*) Draper *et al.* *v.* Jennings *et al.* 2 Vern. 518.

But

But those not parties to the suit will not be bound by such decree (*d*). Thus, where *R* mortgaged his estate to *S* for 99 years, to *P* for 40 years, then to *T* the plaintiff's husband for 1500*l.* and afterwards to *B*; *B* bought in the two first mortgages; then the plaintiff, administrator, *durante minore ætate*, exhibited a bill against *R* and *B*, setting forth a title to discover the defendant's title and redeem; to which the defendant answered, but no farther proceedings were had by the plaintiff. *B* had notice of the plaintiff's title; then *B* notwithstanding exhibited a bill against *R* alone, to redeem or be precluded, and obtained a decree; during all this time *R* was in possession. After preclusion of the defendants to the last bill, *C* bought *B*'s interest; and then the plaintiff, the widow of *T*, brought a bill to redeem, to which *C* pleaded his purchase and the equity of redemption barred. Upon this state of the case, the question was, whether *B* should have made the now plaintiff party to his bill to foreclose, and whether she ought not to be let in to redeem? The Lord Keeper declared, that the case was to be judged by comparing them on both sides, and so chusing the least inconve-

(*d*) *Sherman v. Cox*, 3 Rep. Ch. 84. Sc. Nelson's Rep. 71.

nient; that it was extremely mischievous to the mortgagee, to make all persons that had interest parties; for by that every mortgagee, in case of several mortgages, would be continually a bailiff, and his work never at an end; but that, on the other hand, though all were not parties, yet those who were omitted would be helped at last, as they would be entitled to their principal, interest, and costs; for they might come in as to the first, second, third, or fourth mortgagees, whereas, if the plaintiff should *not* be relieved, it would be irreparable loss and ruin; and trouble and pains being less prejudicial than ruin and total loss, his Lordship over-ruled the plea.

If there be tenant for life, reversion in fee, and he in reversion mortgages his estate in fee, and the mortgagee devise it, the devisee may bring his bill to foreclose against the mortgagor (*e*), and need not make the heir of the devisor a party; because he hath no interest in the land, it being all devised away from him; and therefore the devisee need only foreclose the mortgagor.

(*e*) *How v. Vigures, supra.* 1 Eq. Ca. Abr. 318. 5.

It was said in the case of *Sale and Freeland and others, infants*, on a bill to redeem a mortgage made by the father of the defendants, or be foreclosed, that the Court would sometimes decree infants to be foreclosed before they came of age (g).

But the interest of infants is so far regarded and taken care of, in the Court of Chancery, that no decree to foreclose can be made against them (h), without giving them a day to shew cause against it when they come of age.

Thus, upon a bill brought to oblige an infant to redeem a mortgage (i); upon the hearing, it was decreed to an account, and the infant to pay what should be reported due, *unless cause, &c.*

(g) *Sale v. Freeland et al.* 2 Vent. 351.

(h) *Per Ld. Chan.* 2 Vern. 342. *Booth v. Rich*, 1 Vern. 295. *Gundry v. Baynard*, 2 Vern. 479. *Taylor v. Philips*, 2 Vez. 23. *Cook v. Parsons*, Pre. Ch. 185.

(i) *Bennet v. Edwards*, 2 Vern. 392. *Leving v. Lady Caverly*, Pre. Ch. 229.

The words of such decree are thus (*k*): "And this decree is to be binding to the said *J S*, the infant, unless he shall, within six months after he shall attain the age of twenty-one years, (being served with process for that purpose) shew unto the Court good cause to the contrary."

If he shew no cause (*l*), the decree is made absolute upon him; but when he comes of age, and shews cause within the six months (*m*), he may, upon motion, put in a new answer, and make a new defence; for it would be to no purpose to give him a day to shew cause, if the infant notwithstanding was concluded by what his guardian had done, who may have made an improper defence, or may have mistaken the nature of his case (*n*).

This process is, by way of *subpæna*, to be served on the defendant on his coming of age, and is a judicial writ, and must be returned in

(*k*) 3 Bacon's Abr. 148.

(*l*) *Ibid.*

(*m*) Bennet *v.* Lee, 2 Atk. 532.

(*n*) Fountain *v.* Caine and Jeffs, 1 Wills, 501. Lady Effingham ex. of Lord Howard *v.* Sir John Napier, 3 Brown's Parl. Ca. 301. Sc. 2 Will. 401.

term

term time. If the infant shews no cause, the decree is made absolute.

But when he comes of age, he will not be permitted to go into the account (*o*), nor will he be so much as entitled to redeem the mortgage, by paying what is reported due; but *will be only entitled to shew an error in the decree, or that it was unjust*; this was admitted as law, by the counsel on both sides, in the case of *Lyne v. Willis*, 13 May, 1730.

And where the mortgage depended upon a disputable title, *viz.* whether the ancestor of the infants had executed a power, out of which his right to mortgage arose, and so no money could be expected upon assignment of it over; the court would not decree the infants to be foreclosed, until they came of age (*p*).

It is said, the proper way, in case of an infant, is to apply for a decree, that the lands may be sold to pay the debts, and that will bind him (*q*); for, in that case, no forfeiture will incur to him, as the surplus will be his,

(*o*) *Mallack v. Galton*, 3 Will. Rep. 352.

(*p*) *Sale v. Freeland et al.* 2 Vent. 351. *Supra*, 485.

(*q*) *Booth v. Rich*, 1 Vern. 295. *Supra*, 289.

after the debts paid. But even then, if he be decreed to *join* in the conveyance, he must have a day after he comes of age (*r*) ; for there is no other way than this, for the infant to set forth his title, which he ought to have an opportunity of doing.

But, if the mortgagee or his alienee be satisfied (*s*), and does not require that the infant should be a party to the sale ; in such case, the legal title being in the mortgagee, and the infant having a mere equity ; the decree for sale, the infant being no party, may be made without a day to shew cause, but then the case will be open to investigation, when the infant attains his age.

But, a Court of Equity, where an infant is plaintiff, follows the rule of law, where it is held that he is as much bound by a judgment in his own action, as if of full age (*t*) ; and, accordingly, in a suit of equity, where an infant is plaintiff, he is as much bound, and as little privileged, as one of full age. And this rule

(*r*) *Cook v. Parsons*, 2 Vern. 429. *Pre. Ch.* 184, 5.
Fountain v. Caine, 3 P. Will. 504.

(*s*) *Cook v. Parsons*, 2 Vern. 429. *Vid. 9 Mod.* 128.

(*t*) 2 P. Will. 519. 3 Atk. 627.

is general, unless gross *laches*, or fraud and collusion, appear in the *procchein amy*, then the infant might open a decree by a new bill.

Lord *Hardwicke*, in the case of *Gregory* and *Molefworth* (*u*), wherein he assented to the rule last-mentioned, observed that he knew but of one case that was an exception; that of Lady *Effingham* and Sir *John Napper*, where, upon an appeal from Lord *Macclesfield*'s decree, with regard to real estate (*x*), the House of Lords gave Sir *John Napper* leave to show cause, when he came of age, against his own decree.

But it is observable that the cause alluded to was instituted on the ground of undue influence, which is a species of fraud.

However, since such decision has been made against the rule on appeal to this high jurisdiction, it may be at least questionable whether a court of equity would not be induced on slight grounds, to admit an infant to shew cause against a decree in his own suit respecting his

(*u*) 3 Atk. 627.

(*x*) 2 P. Will. 404. 3 Bro. Parl. Ca. 1.

real estate; although they might decide otherwise, as to suits, with regard to his personal estate, or respecting his maintenance, education or the like, from the mischiefs that would be incident to suffering him, by a new bill, to dispute proceedings in those respects.

It is said, that if a woman, before her marriage, or the ancestors of a woman, mortgage lands, and the equity of redemption thereof vest in her, being a *femme covert*; upon a bill brought by a mortgagee to foreclose (*y*), she is liable to be absolutely foreclosed, though the procedure be during the coverture; and it is certain, that *she shall have no day given to her, or her heirs, to redeem after the coverture shall be determined.*

This distinction between the case of a *femme covert* and of an infant, as to a day to shew cause, results, I apprehend, from the different causes which give rise to their respective disabilities, and from the duration of those disabilities (*z*). The disability of infants is the consequence of a privilege given them by law,

(*y*) *Mallack v. Galton*, 3 Will. Rep. 352. *Supra.*

(*z*) *Vide Hob.* 95. 1 *Vez.* 305. 10 *Co. Rep.* 43. a. 3
Atk. 712. 1 *Inst.* 246. 403.

for their protection, founded on the natural inability which is presumed to attend persons of tender years, to act for themselves, and which determines with their minority. That of *femmes covert* is an absolute incapacity, arising from their having lost, by coverture, all powers of acting for themselves; the law considering them as having voluntarily delegated their rights to their husbands, or rather, that their rights are merged in those of their husbands. The law, therefore, considers an infant as capable of doing *no binding act* during a certain definite period, *unless* it be evidently for his own good; but from a *femme covert*, the law takes the right of acting respecting her civil concerns; and having invested the husband with the right of acting for her, leaves her liable to the consequences of his neglect, if there be no fraud. The right, therefore, to shew cause against a decree of foreclosure, made during infancy, after the infant attains his full age, is, in equity, analogous to the privilege he hath at common law, on an action brought in relation to his inheritance, the decision upon which would be a perpetual bar to him, to pray the *parol* to demur; for, as in such case, at law, he was not permitted to go on, but for the tenderneſs of his years (in respect whereof

the law inferred want of understanding in him) and for his benefit, that he might not be prejudiced in his estate, the court gave an interlocutory judgment, that the suit should remain over, until he attained his full age; so, in equity, though in respect of the original contract, and the right of the mortgagee to his money, and to enable him to procure it, a decree to foreclose is not stayed, yet the *rights of the parties* remain just as they were, until he attains his age; when, if any reason existed *at the time of foreclosure*, which, if urged to the Court, would have been a ground for refusing it, he may take advantage of that, and have it opened (a); but the *parolle* never demurred on account of coverture, for there was no *natural incapacity* to act in the wife, but a *legal disability*; she having delegated her power to another by her own act, and, thereby, made herself liable to the consequences thereof; and it would have been repugnant to every principle of equity, that the mortgagee, who lent his money under a stipulation to be repaid at a time certain, for the performance of *which the land was bound*, should, by the *accident* of coverture, have been hung up for an indefinite

(a) Co. Litt. 246,

period

period of time, to be determined by the death of the husband ; for this differs from the case, where husband and wife have a right of entry, which, if lost by the neglect of the husband, will be renewed in the wife after his death : as there the right to the lands is in the wife, and comes to her at a period when, by her incapacity, she cannot avail herself of her right of entry, as the means of recovering her estate, and no person is injured thereby ; but in the case of a mortgage, the right to the lands, in law, is vested in the mortgagee, by the contract of the parties, for want of performance of the condition ; and the Court is only called upon, to enforce the contract, by closing the equity of redemption, without which the mortgagee can neither get his money, nor safely intermeddle with the land.

But, although a *femme covert* shall not have a positive day given to her, on which she may shew cause against the decree (*b*), as an infant shall, yet, I apprehend, if a bill be brought against her and her husband, during coverture, respecting her inheritance, which he claims merely in her right, and he afterwards dies, the

(*b*) Gilb. Forum Romanum, 161. Evans *v.* Logan. *Et quide* 2 P. Will. 450. 3 P. Will. 238.

right

right surviving to her, she may draw into question and examination the validity of the decree obtained against her during coverture, and avoid and reverse it, if there be *just cause* so to do.

Mr. Justice *Wright* observed (*c*), in the case of *Sutton and Stone*, that he did not apprehend the Court of Chancery would point out what title the mortgagor should make on a bill to foreclose, but would decree him to make such title to the mortgagee, as he was capable of doing: And thereupon, in the case in question, he directed a good title to be made by the defendant to the plaintiff, and the principal interest and costs on the mortgage to be paid in six months, or the defendant to stand absolutely foreclosed.

If there be any unfair conduct in the mortgagee, the Court will open the foreclosure.

Thus, where a mortgagee obtained a decree to foreclose the mortgagor (*d*), pending a suit by his creditors to have the estate sold for pay-

(*c*) 2 Atk. 101.

(*d*) Solely v. *Salisbury*, 9 Mod. 153. Sc. 2 Eq. Ca. Abr. 600. p. 25.

ment of their debts ; the Court decreed, that the creditors should redeem upon payment of principal, interest, and costs, to the mortgagee, and referred it to a Master to take an account thereof, and directed that the lands should be sold to pay the creditors.

So, if there be a mortgagee, and several judgment creditors, and the persons to whom the judgments are given, give the mortgagee notice thereof, and tender him payment (*e*) ; if the mortgagee, afterwards, obtain a decree to foreclose, the Court will, upon a bill filed by the judgment creditors, open the foreclosure, and decree them their money.

But if the mortgagee had no actual notice of the judgment, the decree to foreclose would bind the judgment creditor (*f*). *Sed quære*, for, in the principal case, the mortgagee *purchased* the estate, after foreclosure, for a farther sum of money ; and, in the case of *Godfrey v. Chadwell*, it was held (*g*), that a second mortgagee might redeem the first, after a decree obtained by him to foreclose, although the first

(*e*) *Grefwold v. Marsham*, 2 Chan. Ca. 170. *Supra*.

(*f*) *Ibid.*

(*g*) 2 Vern. 601. *Et vid. Morret v. Westerne*. *Supra*.
mortgagee

mortgagee had no notice of the second mortgage, before the decree.

But the first mortgagee shall be allowed all his expences out of pocket.

Thus, where *L*, a second mortgagee (*h*), came to redeem *H*, who had been at great expences in law-suits to foreclose the mortgagor, and otherwise, in relation to the estate; the Court ordered, that his costs should not be taxed, as in an adverse suit, but that he should be allowed all his costs and expences, as was done in the case of a solicitor, who laid out and disbursed money for his client; and farther, that the profits of the estate in question should be applied, in the first place, to pay and satisfy what was due for such costs, charges, and disbursements, before it was applied to sink the principal; for that it was not reasonable he should wait for it, and be allowed it only on the foot of the account (as had been usually done) whereby he might lose the interest thereof, for ten or more years together.

And a decree to foreclose, though made ab-

(*b*) *Lomax v. Hide*, 2 Vern. 185,

solute,

solute, signed and inrolled, is no plea to a suit to redeem, if surreptitiously procured (*i*).

Thus, where a plaintiff brought a bill to redeem, setting forth, that his late father being seised in fee of lands in *P* of 50*l. per annum*, made a mortgage thereof to *I S*, and that the defendant desired the plaintiff's father would consent, that this mortgage should be assigned to the defendant, who would help the plaintiff's father to a place, and be willing to take his interest out of the profits of the place; that thereupon this mortgage was, by the plaintiff's father's consent, assigned to the defendant, who never helped the plaintiff's father to any place; but instead thereof, the defendant, the next term after the mortgage was forfeited, brought an ejectment against the plaintiff's father, and turned him out of possession; and the term next following, the defendant brought a bill against the plaintiff's father, who put in an answer to the bill, and then the defendant got a common bailiff, one of a scandalous character, to make an affidavit, that the plaintiff's father had left his habitation, and (as he believed and was credibly informed) was gone beyond sea; upon

(*i*) *Lloyd v. Mansell*, 2 P. Will. 74.

which

which affidavit the now defendant got an order, that service of the then defendant's clerk in Court might be good service; whereas the plaintiff's father was then living, and publicly appeared in the next county with his wife's relations; but upon this false affidavit, and order made thereupon, the cause was heard *ex parte*, and the report made *ex parte*, and confirmed absolutely; by which means the plaintiff's father became absolutely foreclosed, although the estate was of much greater value than the mortgage.

The defendant pleaded this decree and report (*k*), and both made absolute, signed and inrolled. *Et per curiam*, all these circumstances of fraud ought to be answered; which the defendant has been so far from doing, that he only pleads that decree and report as a bar, which the plaintiff seeks to set aside; and the decree being signed and inrolled, the plaintiff has no other remedy; and if these matters of fraud laid in the bill are true, it is most reasonable that the decree should be set aside, and the plea was over-ruled.

It was objected, in the above case, that ac-

(*k*) *Lloyd v. Mansell*, 2 P. Will. 74.

cording to the rule then laid down, a decree might be set aside by an original bill (*m*) ; but the Court replied, that such a gross fraud as this, was an abuse of the Court, and sufficient to set any decree aside.

The time for payment, limited on a decree for foreclosure, may be renewed several times, upon special circumstances.

Thus, where a decree for foreclosure was made, and six months time given thereby for redeeming, according to the usual form of those decrees (*n*) ; the six months being near expiring, the mortgagor obtained an order for enlarging the same for six months more. After this, he produced another order for enlarging the time six months farther, but it was made part of that order, that he should sign the Register's book, and thereby agree not to ask for a farther enlargement. He signed the Register's book for that purpose accordingly. Notwithstanding which, on a farther motion, that the time might be enlarged six months more upon this circumstance, that the estate

(*m*) *Lloyd v. Mansell*, 2 P. Will. 74.

(*n*) Anonymous, *Barnard Rep.* 221. Sc. 2 Eq. Ca. Abr. 605. 37.

was of greater value than the incumbrance upon it amounted to, the Lord Chancellor was of opinion, that, upon that ground, the motion was reasonable; but made it part of his order, that this last time should be peremptory.

And where it appeared that, notwithstanding a continued endeavour, on the part of the mortgagor, to sell the lands mortgaged, and pay what was due, he was prevented by inevitable necessity, and no wilful default could be alledged in him, as where a rebellion was subsisting (*o*); the Court enlarged the time, as to the performance of such a decree, *notwithstanding it had been signed and inrolled*.

A decree for foreclosure will not be opened in favour of a mere volunteer (*p*); for a mortgagee is a purchaser, and so hath equal equity with a volunteer, and an absolute estate, in law, by the foreclosure.

It has been observed, that in *Welch* mortgages, where, by special agreement, profits

(*o*) 1 Ch. Ca. 63, 4. Cocker *v.* Beavit, 1 Rep. Ch. 253. Ismoord *v.* Claypool, 1 Ch. Rep. 139.

(*p*) Roscarrick *v.* Barton, *supra*. Sc. 1 Eq. Ca. Abr. 317. 4.

are

are to be set against interest, there can be no foreclosure; but on tendering principal and interest, the mortgagor may come into Chancery for a redemption at any time (*q.*) . The reason is, because, in such cases, there is nothing for the rule laid down by the Court in analogy to the statute of limitations, to operate upon, for there is no forfeiture, and it is on forfeiture that the rule begins to attach. And though, in such case, the mortgagee becomes in the nature of a perpetual bailiff to the mortgagor, which is an additional objection to opening long accounts, yet that does not hold, where the mortgagee voluntarily takes the estate subject to a perpetual account, because he ought not to be relieved from his own contract and agreement.

A foreclosure, obtained by a first mortgagee against a second mortgagee, will be opened in favour of such second mortgagee, if the land be afterwards devised by the *first* mortgagee to the *mortgagor*; for although the second mortgagee, having accepted the lands already mortgaged for his security, must hold them, subject to the same conditions, to which they are

(*q.*) 1 Vez. 406. *Howel v. Price, supra.*

liable in the hands of the mortgagor (he being able to convey only what he has, which is an estate subject to foreclosure, unless redeemed either by him, or those claiming under him); yet as between the mortgagor and mortgagee, the debt continuing due, and the charge on the estate valid, it is capable of re-attaching upon the lands, if they come again into the hands of the mortgagor, or those of a subsequent claimant under him; and the mortgage deed may be made use of, as a kind of equitable estoppel, to any plea the mortgagor may put in, in answer to this claim. It in some degree resembles the case, where a man makes a lease, by indenture, of *D*, in which he has no interest, and then purchases *D* in fee, and afterwards bargains and sells it to *A* and his heirs (*r*); in which case, *A* will be subject to the lease (*s*). So, where a trust is broken, and then something done which is a full bar to the *ceftui que trust*; yet the land coming afterwards to the trustee's hands, he will be decreed to convey to the *ceftui que trust*.

Thus, where there was a first and second mortgage made of the same estate, the first

(*r*) Salk. 276.

(*s*) Lord Canmore's case, cited 1 Vern. 148.

mortgagee brought a bill against the second, to compel him to redeem or to be foreclosed, and foreclosed him accordingly (*t*) ; afterwards, the first mortgagee, by his will, devised the same premises to the mortgagor ; whereupon the second mortgagee brought a new bill, to set aside the first mortgage, and to be let into a satisfaction of his money ; to which the defendant pleaded the former suit, and decree of foreclosure : but the Court ordered the defendant to answer the bill.

A mortgagee may, after a foreclosure, proceed on his bond or other collateral securities.

Thus, where *E* made a mortgage of some leasehold estates to *R* for 1200*l.* and afterwards sold the premises to *W* for 1500*l.* *W* paid off parts of the mortgage-money at different periods, and died (*u*). His nephew afterwards paid off a farther sum. Then *R* filed his bill against the representatives of *W*, to foreclose the equity of redemption, and obtained a decree for that purpose, which became

(*t*) Cook *v.* Sadler, 2 Vern. 235.

(*u*) Tooke *v.* Hartley, 2 Bro. Chan. Rep. 126.

absolute. Then *R* got into possession. The value of the premises not being equal to the mortgage-money, *R*'s executors put up the estate to sale by public auction, but no sum being bid equal, in their opinion, to the value, the estates were bought in by a trustee for them, at 400*l.* Notice of the day and time of sale had been sent to *D*, who was the executor of *E*. Then the executors of *R* brought an action against the executors of *E*, on the bond for the remainder of the mortgage-money, unsatisfied by the sale of the estate, and obtained a judgment at law. Then the executors of *E* filed a bill, praying an injunction, and that the bond might be delivered up to be cancelled; insisting that the mortgagee having foreclosed the equity of redemption, and taken the pledge, had made his election, and relinquished his right to a personal remedy. But it was answered, that the executors of the mortgagee were certainly entitled to proceed upon the bond for what the pledge proved deficient to pay. And the Chancellor was of opinion with those who supported the action, that they had a right to proceed at law.

But in such case it is prudent to give the mortgagor notice of the day and time of sale,

so that he may prevent it if he please, by redeeming; and that mode of proceeding will be an answer to any objection, or the foundation of fraud in transacting the sale.

But, if the mortgagee, after having obtained a decree to foreclose, take out process upon any counter-security, with intent to recover his mortgage-money, this amounts to a waiver (*x*). As if a mortgagee, after having got a decree to foreclose, which is signed and inrolled, bring an action of debt on the bond given at the same time, for payment of the money and performance of the covenants in the mortgage-deed; such action will open the foreclosure, and let in the equity of redemption of the mortgagor. For though the Court will, in its discretion, after a reasonable time, allow the mortgagee to take the benefit of the condition, annexed to his estate; yet, as this is requiring to have strict law, and often attended with actual injustice, and the payment of the money is the essence of the contract, and effects substantial right between the parties, the Court is willing to seize any opportunity, either of an actual or implied consent of the mortgagee to

(x) *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317. 3.

open the foreclosure, and let in the mortgagor to redeem.

But a bill of revivor, and supplemental bill, will be no waiver of a decree to foreclose (*y*). Thus, where, in 1717, a bill was brought to redeem, or be foreclosed; and likewise a cross bill to redeem, on which there was a decree to be let in, on payment of principal, interest, and costs, or else to be foreclosed; the mortgagor died; and the account being taken, the plaintiff, finding the estate insufficient, brought a new bill of revivor, and partly a supplemental bill, both to review the former decree and proceedings, and likewise to have an account of the assets of the defendant, the mortgagor, and thereout to have satisfaction for a bond, which was given, as a collateral security, with the mortgage. The defendant, who was the executor of the mortgagor, pleaded the former decree, in bar; insisting, that the plaintiff had elected his satisfaction, and had not so much as suggested, that it was deficient, so that it did not appear, but that he might receive a double satisfaction for his debt; and that it was plain he had not waived the mort-

(*y*) Birch's case, Gilb. Rep. Eq. 186.

gage

gage by his bill of revivor. The plaintiff insisted, that it was the practice of the Court, that taking out of process, or making use of any counter-security, was, in itself, a waiver of the foreclosure; and that a mortgagee had always his election to waive, and open the foreclosure, and to have recourse to his bond and covenant, if he thought proper. But the Court was of opinion that the plaintiff, by his revivor, had not waived the mortgage, or so much as suggested a deficiency; and the plea was directed to stand for an answer, without liberty to except.

Except in the instances already mentioned, I do not find that any rules have been, nor, do I apprehend, any can be laid down by Courts of Equity, as to the exercise of their jurisdiction in opening foreclosures, either with respect to the time, which shall be considered as a bar, or to the particular circumstances, which will entitle a suitor to this interposition of the Court; for cases of this sort embrace such a variety of considerations, and are frequently so complicated in their nature, that each depends, in a great degree, upon its own combined circumstances; and may be rather considered, as an instance of the fact, that the

Courts will interfere to open a foreclosure, than as a general rule, as to the circumstances in which relief will be given,

Thus, a decree of foreclosure was opened, after sixteen years, where the bill was against a mortgagee, who had obtained his security, part by original mortgage, and part by assignment, *procured under colour of being a friend to the mortgagor*; but, in truth, with a view to get him into his power, that the mortgagee might, upon his own terms, purchase his estate, which was worth three times as much as the money that had been advanced thereupon (z).

But where the mortgagee, in 1711, entered into possession, upon a foreclosure made absolute by consent, and, considering himself as having an absolute estate in the mortgaged premises, by virtue of the decree, proceeded to make improvements thereon, by pulling down buildings that were ruinous; the mortgagor, six years after, in 1717, moved the Court for farther time to redeem; and it was

(z) Burgh v. Langton, 15 Vin. Abr. 476. p. 2. Sc.
2 Eq. Ca. Abr. 609. 5. 2 Brown's Ca. Parl. 544.

so ordered upon terms (*a*). But this, and several other orders grafted thereupon, similar in their nature, were reversed, on appeal to the House of Lords, upon the grounds, that it was not consistent with the practice of Courts of Equity, or warranted by precedents, to enlarge the time for redemption, after the mortgagor's acquiescence for six years, under a foreclosure, by his own consent; especially, after an alteration had been made in the estate, either by pulling down the buildings, enlarging them, or otherwise; that the appellant had been two years in possession, before he began alterations on the estate, when he might look upon it as his own, having such a title as would satisfy a purchaser; and that the money, reported due to the appellant, amounted to as much as the clear rent, at fifty-eight years purchase, exclusive of subsequent interest and costs that would incur, if the litigation were suffered to proceed.

In the last case, the mortgagor urged, the appellant's acquiescing at first in the order made in 1717, in the examining witnesses, and

(*a*) *Lant. v. Crispe, et al.* 2 Bro. Parl. Ca. 111. 2 Eq. Ca. Abr. 599. Ca. 21. Vin. vol. 15. p. 467. Ca. 16.

not opposing the subsequent orders for enlarging the time, as amounting to an admission, that those orders were just, and that the estate in question was still redeemable.

So, in the case of *Wichalſe*, executor of *Wichalſe v. Short*, neither over-value in the estate, or even a parol agreement to redeem, were held by Lord *Cowper* or Lord *Harcourt*, Chancellors, to be sufficient reasons to open a foreclosure after twenty years (*b*) ; and their decree was afterwards confirmed on appeal to the House of Lords.

In that case *W*, the plaintiff's late husband, having mortgaged his estate at *L*, to several persons, and the mortgagees pressing for their money, the defendant *S* was prevailed on to advance 1000*l.* for discharging those incumbrances ; and, accordingly, the former mortgages were assigned to him by deed, dated the 29th of *September*, 1691. He afterwards advanced to *W* a farther sum of 500*l.* on the 3d

(*b*) *Wichalſe Executor of Wichalſe v. Short*, Brown's Ca. Parl. 414. 2 Eq. Ca. Abr. 277. Pl. 1 Vin. vol. 7. p. 298. Ca. 15. vol. 15. p. 478. Ca. 2.

of December, 1692; so that the estate then stood mortgaged to him for 1500*l.* and interest.

Neither principal or interest being paid at the time limited by the mortgage, or for above two years afterwards, *S*, in 1694, exhibited his bill against *W*, in order to foreclose; to which bill, *W* put in an answer, admitting the 1500*l.* and interest to remain due, and offering to pay the same, at such time as the Court should appoint; but desiring a reasonable time to sell his estate for that purpose.

On the 10th of July, 1695, this cause was heard; and a reference was made to a Master to compute the sum due, &c. and, on payment thereof by *W*, at or before *Lady-day* then next, he was to have a re-conveyance from the plaintiff; but, in default thereof, to stand foreclosed; and it was decreed, by consent, that if, in the mean time, *W* could procure a purchaser for the estate, *S* should join in a sale thereof,

The time for payment, appointed by the Master, which was the 29th of August, 1696, was afterwards enlarged to the 24th of July, 1697, when, the money not being paid, nor

any

any purchaser of the estate procured, the decree of foreclosure was, on that day, made absolute, and, it being afterwards duly signed and inrolled, *S* was put in possession of the mortgaged estate.

The mortgagor lived above eight years afterwards, but never attempted to open the foreclosure, or to disturb *S* in his possession; yet he, nevertheless, took upon him to devise this estate to his wife; who, in *Hilary* term, 1708, about three years after her husband's death, exhibited her bill in the Court of Chancery against *S*, praying an account of the rents and profits of the premises, and to be let into a redemption of the estate upon a suggestion that the former decree and proceedings had been obtained by collusion.

To so much of this bill as sought to lay open the foreclosure, the defendant pleaded the enrolled decree, and his possession under the same in bar; and, by his answer, denied any collusion in obtaining that decree. And upon arguing this plea before Lord Chancellor *Couper*, it was allowed.

But

But the plaintiff having replied, and witnesses being examined, the cause was heard before Lord Chancellor *Harcourt*, in April, 1714; when his Lordship declared, that the defendant had fully proved his plea, and therefore dismissed the bill with costs; which decree of dismissal was afterwards affirmed, on appeal to the House of Lords.

It appears, both from the reasons suggested by the parties to the appeal to the House of Lords, and by the report of this case (*c*), that the plaintiff, in the original suit, did not rest solely upon the ground of fraud and collusion, in the original decree for foreclosure, but also relied upon frequent promises made, subsequent to the decree, by the mortgagee to the mortgagor, to be accountable for the rents, and to re-convey on the re-payment of his money, and likewise upon the value of the estate, which was considerably more than what was due to the respondent. But Lord *Harcourt*, in giving his opinion, said, that he knew no instance where a man had been let in to redeem, by a new bill, after a decree of foreclosure signed and inrolled, upon any parol

(c) 2 Eq. Ca. Abr. 177. 1 in note.

agreement

agreement or declaration, or by reason of any over-value of the estate; such a practice would be of dangerous consequence, and shake abundance of titles.

But it is observable, on the principal case, that the mortgagor himself had acquiesced, during his life-time, under the decree; and that the plaintiff's claim was that of a voluntary devisee of an equity of redemption, which had been duly and regularly foreclosed, *near seventeen years before*: for perhaps a difference would be made if the application came early, and was from the mortgagor himself; especially, if all things were *in statu quo*, and no injury would result to the mortgagee from expences incurred in repairs, improvements, or otherwise; as, in such case, although the mortgagee hath the legal title, yet the mortgagor seems to have the greater equity. Besides, as the original intention of the parties was a loan, not a purchase, no injustice would be done by giving the mortgagor time to redeem, upon making full satisfaction to the mortgagee.

Such a distinction seems to be warranted (*d*), by the observation of the Court in the case

(d) 1 Ch. Ca. 220. *Supra.*

of

of *Roscarrick v. Barton*; in which, redemption was denied to a remainder-man after twenty years; but the Lord Keeper said, that he made a great difference between parties that came to redeem, *who were no parties to the mortgage*, and those that were.

The mortgagee calling it a debt, in his will, to a collateral purpose only, will not alter the nature of the estate the mortgagee hath in the premises, after a foreclosure made absolute, and many years possession by the mortgagee.

Thus, where *Charles Stuteville (e)*, 1674, 1675, 1677, and 1678, made several mortgages of his estates, in the county of S, to Sir *Francis North*, for securing several sums of money, amounting in the whole to 2300*l.*; and, in 1682, Sir *Francis North*, in consideration of 2386*l. 5s.* paid to him by Lady *Glenham*, assigned over all his securities, upon this estate, to her and her trustees. Lady *Glenham*, having another demand upon *Stuteville*, of 800*l.* she, in *Easter Term*, 1682, exhibited her bill in Chancery, praying, that he might

(e) *Tooke v. Bishop of Ely, et al.* Brown's Parl. Ca. 119. Viner, vol. 15. p. 476. Note to Ca. 1. 2 Eq. Ca. Abr. 608. Ca. 1.

either pay her both those debts, with interest and costs, or be foreclosed of his equity of redemption. The cause being heard in *Easter Term*, 1683, the defendant was decreed to pay both debts, with interest and costs, by a limited time; and, in default thereof, that he should be foreclosed; but, he neglecting so to do, the foreclosure was afterwards made absolute, and the decree inrolled.

In *May*, 1684, Lady *Glenham* assigned this decree, and all her interest therein, to Mr. Justice *Dolben*; who being kept out of possession, did, in 1693, bring several ejectments, and thereby recovered part of the premises; the residue being held by Mrs. *Stuteville*, the mother of *Charles*, as having an estate for life prior to the mortgages.

Soon afterwards, Justice *Dolben* died, having made his will, and thereof constituted Sir *Gilbert Dolben* sole executor and residuary legatee; but in this will was the following clause: "And, if Mr. *Stuteville's* debt be well paid, as I doubt not but it will, I order my executor, *Gilbert Dolben*, to pay the sum of 4800*l.* amongst the children of my nephew, *John Dolben*." And, upon calculation, this sum

sum of 4800*l.* exactly agreed with the money decreed to be paid, with the interest thereof, from the time of the decree to the date of the testator's will:

Upon the death of Mrs. *Stuteville*, Sir *Gilbert* brought an ejectment, and recovered the lands held by her, so that he was in possession of the whole estate.

In *July*, 1694, *Charles Stuteville* exhibited his bill in Chancery against *Gilbert Dolben*, praying, that he might be at liberty to redeem, on payment of the mortgage-money, and interest; but, to this bill, the defendant pleaded the former decree of foreclosure, and insisted, that the plaintiff ought not to be let in to a redemption.

On the 10th of *July*, 1695, this cause came on to be heard before the Lord Chancellor *Somers*, when the defendant's plea was allowed; but his Lordship recommended an accommodation, and accordingly it was ordered, by consent, that the defendant should be at liberty to redeem, upon payment of principal, interest, and *costs*, to be computed by the Master. The plaintiff, however, not complying with this or-

der,

der, nor being willing to abide by this judgment of the Court on the plea, moved for leave to amend his bill; and this the Court thought proper to grant, on condition of his giving his own recognizance not to disturb *Gilbert Dolben*, or his tenants, or commit waste; but if he refused to comply with this condition in a month, then his bill was to be dismissed with costs, without farther motion; and *Stuteville* not complying with this order, his bill was dismissed accordingly.

Stuteville, still apprehending he had a right to redeem, by deed, dated the 24th of *May*, 1700, settled the premises upon trustees, in trust to sell, and pay Sir *Gilbert Dolben* and all his other creditors; and then, in trust for himself, his heirs, executors, administrators, and assigns. He also made his will, and thereby devised all his estate, real and personal, and his equity of redemption in the premises, unto *Catherine Tooke*, her heirs, executors, administrators, and assigns, and soon afterwards died.

In *December*, 1702, eighteen years after the decree of foreclosure, Sir *Gilbert Dolben* assigned over all his estate and interest in the premises to the bishop of *Ely*, in consideration of

of 8000*l.* who afterwards purchased of the representatives of Mrs. *Stuteville*, a debt of 5800*l.* due to her for the arrears of her jointure, and for which she had obtained a decree, whereby the whole stood charged with the debt.

In June, 1703, Catherine *Tooke* exhibited her bill against Sir *Gilbert* and the bishop of *Ely*, praying a redemption of the premises, on the foot of Lady *Glenham's* decree; and that she might have a re-conveyance, and an account of the rents and profits. To this bill, Sir *Gilbert* pleaded the decree of foreclosure, the bishop likewise pleaded that decree, and his several purchases from Sir *Gilbert*, and from the representatives of Mrs. *Stuteville*; and upon arguing these pleas, before the Lord Keeper *Wright*, on the 21st of July, 1704, they were allowed.

From this order, the plaintiff appealed; insisting, principally, that, by Mr. Justice *Dolben's* will, and the subsequent proceedings, the foreclosure was opened; and that nothing had been since done, to bar the appellant of her equity of redemption.

On the other side it was contended, that Sir *William Dolben's* calling it *a debt* in his will, to a collateral purpose only, could not alter the nature of the estate he had in the premises, any more than the calling a leasehold estate an estate in fee simple, would have converted the leasehold into a freehold; that the bishop of *Ely* was a purchaser of the estate, at a very great price, under a decree which had been signed and inrolled above twenty years, and which had been twice allowed, as a good bar of the redemption: and so it was held by the Lords, and the appeal was dismissed, and the decree and order affirmed.

Nor will a decree of foreclosure be set aside, after twenty years, for matter of form only; not even although the estate become of considerably more value than the money lent thereon: but a demurrer to such bill will be good (*f*).

If tenant in tail of an estate (*g*), subject to a mortgage, suffer a recovery, and sell part thereof, and afterwards the mortgagee exhibit a bill for foreclosure or sale; though, in law,

(*f*) *Jones v. Kenrick*, 15 Vin. Abr. 470. Pl. 18.—See 3 Brown's Ca. Parl. 315—2. Eq. Ca. Abr. 602. Ca. 31.

(*g*) *Kirkham v. Smith*, 1 Vez. 261.

he hath a right to have all parts of the estate liable to his satisfaction, yet the equity is, that the part sold should not be meddled with, unless the remainder be not sufficient for the satisfaction of the mortgagee.

On mortgage of a *reversion*, and decree to redeem, instead of the alternative, “ or *the mortgagor to be foreclosed*,” the Court decreed, that the mortgagee *should sell to satisfy the debt*.

Thus (*h*), where *G* being in his life seised in fee in a reversion of lands depending upon the life of *H* by deed, dated the 25th November, 18 Jac. mortgaged the lands to *A* and *K* and their heirs; afterwards the mortgage became forfeited; when *K* by deed, dated 1st March, 22 Jac. released all his right, title, interest, claim, and demand, in the lands unto *A* and his heirs for ever. *A* by his will, devised the said premises to *L* in fee. *L* being a merchant, and his livelihood consisting in the returns of money, and the consideration in the said deed of mortgage being 340*l.* disbursed in 18 Jac. upon a dry reversion, exhibited a bill

(*b*) *How v. Vigures*, 1 Ch. Rep. 33. *Supra*.

to oblige the heirs at law of the mortgagor to repay the money, with damages, or else to have the lands decreed to him, to the end that he might sell them; and so the Court decreed.

And if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale of the mortgaged estate in the first instance.

But in such case there is a distinction where the same person is heir and also executor, and where those characters are filled by different persons.

The two last-mentioned propositions were assented to by the Court of Chancery in the following case :

S (*i*), deceased, mortgaged the estate in question to *D* in fee, and afterwards died, leaving *T* his brother and heir at law, who also took out letters of administration. Then *D* filed his bill against *T*, praying an account of the principal and interest due on the mort-

(*i*) *Daniel v. Skipwith*, 2 Bro. Rep. Chan. 155.

gage, and also a sale; and in case the mortgaged estate should not prove sufficient to pay the principal and interest due, that the deficiency might be made up out of the personal estate, and in case *T* should not admit assets, that there might be an account of the personal estate. In the bill he stated the bond and mortgage, and that the personal estate was deficient; *T* by his answer admitted that the personal estate was very small, and would be deficient, and the cause coming on before *his Honor*, he ordered according to the prayer of the bill. From this decree the defendant appealed, because it had not ordered an account of the personal estate in the first instance, or that so much of the estate only, as should be necessary, should be sold. *Sed per curiam*; the decree is of course, the heir and personal representative being the same person; though, if they had been different persons, it would have been necessary first to have an account of the personal estate.

Where one executor is a mortgagor to the testator, the bill must be for sale not foreclosure (j).

(j) 2 Atk. 56.

4 A 4

And

And where the bill was to foreclose, and the defendant appeared (*k*), and stood in contempt for not answering to a sequestration, and the cause came on upon the sequestration, for the bill to be taken *pro confesso*; and the council for the plaintiff prayed a decree for a sale instead of a foreclosure; because the security was defective, and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree for foreclosure, and he insisted that such decrees were usual. But his Honour said, that he never had known any; but that where the security was defective, it was often indeed referred to a Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto*. But in this case he decreed a sale, because the decree was that the bill should be taken *pro confesso*, and not according to the prayer of the bill.

It seems to have been formerly doubted whether, where there is a debt secured by mortgage, and also a bond debt due from the same person, and the mortgagee exhibits his bill to redeem or be foreclosed, the mortgagor may redeem without discharging the bond debt, as well as that by mortgage; but I apprehend this

(*k*) Dashwood *v.* Bithazy, Mosel. 196.

doubt

doubt is totally removed by the modern decisions upon the subject (*l*) it arose from, not attending to the distinction, between an application from the mortgagor to redeem, and one by the mortgagee to foreclose; for we are to observe, that the reason on which that opinion had prevailed in Courts of Equity, on application made by the mortgagor to redeem, was, because he who wishes to have equity rendered to him, must render it to those against whom he applies for it. Thus, if a mortgagor, after having forfeited his estate in law to the mortgagee, by neglecting to perform the condition to which he had made it subject, applied to equity to enable him to redeem, it was thought just, that when equity interfered to take from the mortgagee the estate, which by law was become absolutely vested in him, care should be taken that the mortgagee was not prejudiced by its interposition; which, viewing a mortgage as a complex transaction, and not simply as a debt, it would be, if other debts that he had let the mortgagor contract, perhaps, in some degree, under confidence that they would be covered by his former security, were left undischarged. But there is no pretence for the interposition of this maxim, where a mortgagee comes to foreclose; for his intention is to shut out the

(*l*) *Vid. supra.* 397—404.

mortgagor from *his* equity, and strictly to enforce *his own* legal title. In such case therefore, the mortgagee electing for himself, and choosing to have a strict performance of the contract, the only equity which he is entitled to against the mortgagor, seems to be, to be decreed exactly that which the law would give him, and for which he hath stipulated, namely, the *land*, or the *mortgage-money only*.

And it seems to have been so determined, in the case of *Sharpnell v. Blake* (m), which, as to the point in question, was thus: *B* being seised in fee of a copyhold estate held of the manor of —, upon the 5th of *October*, 1725, made a conditional surrender of it to the plaintiff *S* to secure 400*l.* and interest, and afterwards borrowed 50*l.* of *S* upon bond. Then *B*, by two surrenders (the first dated 26th *May*, 1733, the other 27th *May*, 1734) mortgaged his estate to the defendant *T* for 650*l.* The 29th of *August*, 1734, *B* became a bankrupt. Some time in *October* following, *S* delivered ejectments against the tenants to get possession of this estate. Upon 30th *October*, the defendants *T* and *H*, as assignees, gave *S* notice that they would pay him his money due upon the mortgage, the 11th *November*

(m) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603. 34.
vember

vember following. Upon the 6th *November*, 1734, *S* not having attended at the time and place appointed to receive his money, filed his bill for a foreclosure. *T* brought a cross bill to redeem *B*'s mortgage, upon payment of principal and interest: *S*, the defendant in the cross cause, insisted upon being paid the bond-debt of 50*l.* as lent upon security of the mortgage; for that, at the time of lending, it was so agreed, and charged that *T*'s mortgages were only colourable and fraudulent, to cover the estate from debts. *T* was *B*'s son-in-law, and had made no proof, in the cause, of the payment of the pretended consideration-money for the two mortgages; but the Lord Chancellor held, that this bond-debt could not possibly be tacked to the mortgage.

And his Lordship, in delivering judgment upon this case, observed, that it had been settled, that a mortgagee might insist upon being paid a bond debt *against* the mortgagor; that the case was still stronger *against* a second mortgagee or assignee of a commission of bankruptcy (*n*); and that there must be an enquiry before the Master, or by directing an issue, whether any money was lent upon these mortgages, in order to determine to whom the equity

(*n*) *Quære, et vid. supra, 397—404.*

of

of redemption belonged, *viz.* whether to the assignees, or to the plaintiff in the cross cause in his own private right; the decision, as to taking the bond debt, is not reconcileable to the observation made by the Chancellor, on any other ground, than that of *S*'s being plaintiff in the bill to foreclose; that seeming to be the only difference, in his Lordship's mind, between this case, and the case cited by him as settled; the right between the *puisne* mortgagees and the assignees remaining undetermined.

This distinction, between cases where the application to equity is made by the mortgagor, and cases where it moves from the mortgagee, is analogous to a rule laid down on occasions not very dissimilar, namely, where equity is required to carry the debt beyond the penalty of a bond (*o*); for where the plaintiff came to be relieved against the penalty of a bond, it was so decreed, upon payment of the principal, interest, and costs, though they exceeded the penalty; and the decree was affirmed upon an appeal to the House of Lords. So, where lands were extended on a statute or judgment (*p*), at

(*o*) 1 Eq. Ca. Abr. 92. 10. Show. P. C. 15.

(*p*) 1 Eq. Ca. Abr. 92. 8. 1 Vern. 350.

much less than the real value, and the conusee came into equity, to make the conusee account according to the real value, he could not be relieved without paying all that was due for principal, interest, and costs, although they exceeded the penalty; but where the vendor of lands entered into a recognizance of 1000*l.* for quiet enjoyment, which was forfeited (*q*); though the loss the vendee sustained was much greater than the penalty, yet, upon application by him, the Court would not go beyond it. And where a trustee of a recognizance released it (*r*), without any consideration, upon a bill by the *cestui que trust* against the trustee, the Court decreed him to pay the principal and interest, so as it exceeded not the penalty. And even (*s*), where a settlement or devise was made of lands for payment of debts, and there was a bond debt, the interest of which had overrun the penalty; although such conveyances for payment of debts are construed favourably, yet the creditor, on a bill brought by him, was restrained within the amount of the penalty. The reason why this indulgence is given, on

(*q*) *Billake v. Arundel*, 1 Rep. Ch. 95.

(*r*) *Ievon v. Bush*, 1 Vern. 342.

(*s*) *Anonymous*, 1 Salk. 154.

applications by the obligor, and uniformly objected to, on suit of the obligee, is because the obligee has chosen his own security, and made himself judge what recompence he shall have, in case there be a breach in performance of the agreement (*t*) ; and therefore there is no equity to enlarge or better his security : but where the obligee is defendant, he is entitled to all that is due, before any equity can arise in the obligor. So, in the principal case, the mortgagee having contented himself with a bond for the latter money lent, there is no reason to better his security, by tacking it to the mortgage, and making it a lien on the land, which he might himself have done, had he thought proper, either by a new mortgage or an indorsement upon the old one.

And, I apprehend, that the law would be the same, although the subsequent debt were by judgment or recognizance; for such creditor cannot be called a purchaser, nor does he lend his money upon the immediate view or contemplation of the cognizor's real estate; and though the cognizee has thereby a lien upon the land, yet that arises from the operation of

(*t*) 3 Bacon's Abr. 650.

law,

law, and not from any specific agreement between the parties; and therefore, if the principle before stated, *viz.* that on a bill to foreclose, the mortgagor may redeem on performing his original contract, *viz.* by payment of the mortgage-money, without having any other terms put upon him, be true, the mortgagee will be left, as to his judgment, to his remedy at law.

Where the mortgagee brought his bill to foreclose the defendants (*u*), if the money was not paid in a reasonable time, and a decree was made by default, and it was prayed for the plaintiff, that, in case the defendants redeemed, the plaintiff might be decreed not only his costs at law, of an ejectment, which he had brought to recover the possession, and in the then cause, but likewise in a cross cause brought by the defendants, and then depending: The Master of the Rolls refused to decree him the costs of the cross cause, because he could take no notice, that there was such a cause depending, and the plaintiffs in that cause might proceed, and prevail; and if they did not go on, the cause might be set down *ad requisitionem defendantis*,

(*u*) Anonymous, Moseley, 45.

and he would have costs. But the Council for the plaintiff said, that the decree then would be only personal, and they should have no security for their money, and the plaintiffs in that case might be beggars, and insisted they were entitled to all costs they were put to by this mortgage, and quoted a case at law, which he said was much stronger than this, where the Court would not relieve against the penalty of a bond, till the obligee paid the costs of the former trial, in which the obligee had been nonsuited. But no more was said.

CAP. XXII.

OF OTHER MATTERS RELATING TO MORT- GAGES.

A Mortgage works a severance of a jointency.

Thus (*a*), where three persons were jointly interested in the trust of a term of years, and one of them mortgaged his third part; the question was, whether the jointency was severed in such case? and it was compared to the case of a *will*, which, as we have seen, is revoked *pro tanto* only by a mortgage. But *Cowper*, Lord Chancellor, held, that a jointency was an

(*a*) *York v. Stone*, 1 Salk. 158. Sc. 1 Eq. Ca. Abr. 293. 1.

odious thing in equity; that as to the case of a will, it might be for the benefit of a mortgagor that his will should not be revoked, but that it was to the disadvantage of the mortgagor, who died first, that a jointenancy should continue; because all his estate and interest went from his representatives to the survivor, unless it were construed a severance.

In the case of *Hassel* and *Tynne*, a question arose, whether a mortgage could pass by gift by *parol* (b)? There, Lady *Tynne*, being entitled to a sum of 1000*l.* secured by mortgage upon a real estate, taken in the name of *Frances Hales*; and being old, and afflicted with a disorder, of which she died about six weeks afterwards, delivered the deeds and writings, relating to the mortgage and estate, to *Hassel*, in the presence of several witnesses, one of whom proved, that she made use of this expression at the time, *viz.* "I deliver this as my act and deed." Proof was also read of a declaration by Lady *Tynne*, and particularly one *Adderley* deposed, that subsequent to the delivery of the deeds, Lady *Tynne* said, she hoped, that *Hassel* would be a good girl, for that she had given her a mortgage of 1000*l.* for her own imme-

(b) Amb. Rep. 318.

diate

diate use and benefit. On Lady *Tynte's* death, a bill was filed by *Hassel inter alia*, to have the benefit of this gift. Several questions were made. First, whether this was a *donatio mortis causa*? Secondly, whether it was a *donatio inter vivos*? Thirdly, whether, it being a gift of a mortgage upon a real estate, it could take effect, or was not void by the statute of frauds and perjuries? Lord *Hardwicke* said, that the question on the statute of frauds and perjuries was of great delicacy and nicety. Very slight evidence of the gift had been given by one of the witnesses; the other proved the words made use of at the time; but it was difficult to know what construction to put upon them; whether Lady *Tynte* intended to deliver them to the plaintiff to keep for her. The proof of the declarations seemed to clear up her intention. As to the question, whether it was *donatio mortis causa*, it looked more like *donatio inter vivos*. But there was such a sort of *donatio mortis causa* mentioned in the civil law; but, whether it were the one or the other, the question was, if allowable by the statute of frauds? Perhaps, it would be more favourable to consider it as *donatio mortis causa*. But it partook something of the nature of a will.

No case had been cited, but that of *Richards and Sims (c)*, which came on in a very different shape from the present. It was on a bill by an administrator, to have the deeds and writings relative to a mortgage delivered up, and to be redeemed. The defendant insisted upon a *donatio mortis causa*. Two issues were directed. First, whether the party gave the defendant the deeds? Secondly, whether he declared, that he forgave the debt? Both the issues were found in favour of the administrator; so that it was but a very slight precedent. What had been argued at the bar was very true, that the money was the principal, and the land only the security; and that the money would pass by will not attested according to the statute; and yet here was an interest in land; and it was a very considerable question, whether it could pass by parol? His Lordship was very unwilling to give his opinion upon it, and it was not then necessary, and therefore, at all events, he should reserve the consideration of this question.

No subsequent occasion which I have met with has called for a decision of this question,

(c) *Vid.* this case cited *supra*.

as

as to the validity of a parol gift of a mortgage, the importance of which, when it shall arise, is sufficiently evident, if we consider how great a portion of the real and personal property in this kingdom depends upon mortgages. I shall therefore offer to the reader some observations on the subject of a mortgage of land or stock being disposed of by gift.

Among the various methods of alienating and acquiring property in things, recognized by the common law of *England*, we find that by *gift*, which is distinguishable from other modes of alienation and acquisition by the circumstances, that it is gratuitous, depending upon mere generosity, and not founded on an equivalent, and that the translation of property in this mode, can be affected only by the *actual delivery* of the thing alienated; for although strictly speaking, and on abstract notions of property, the declaration of the will of the owner to alienate any thing, is sufficient for transferring his property therein to the person, in whose favour that will has been plainly intimated; yet, such declaration of the will merely, is not binding in the law of *England*, so as to vest a possession, or even impart a civil right of action. But if a man delivered a thing with a

design of transferring the property of it, this, before the statute of frauds and perjuries, was sufficient, in our law (in which respect it is conformable with the law of nature, and the civil law) for transferring a full right of property, and vesting it in the alienee.

Accordingly, Sir *William Blackstone* (*d*), in speaking of a feoffment, says, that it may properly be defined, the gift of any *corporeal* hereditament to another; and by feoffment, which the ancient writers called *donatio* (*e*), lands and tenements, which lie in livery, might have been passed by livery, by deed or without deed; and Lord *Coke* observes, that *do* or *dedi* is the aptest word of feoffment.

But since the statute of frauds, no direct gift can be made of any interest in real estates, for a longer period than three years, nor of any trust therein of longer duration, without writing, *unless the trust arises by operation of law.*

But a gift of personal things may still be made by word of mouth, attested by sufficient evidence, of which Sir *William Blackstone* says,

(*d*) *Blackstone's Com. Lib. 2, 310.*

(*e*) *Co. Litt. 9. a.*

"the delivery of possession is the strongest and most *essential*." And so it is laid down in *Jenkins's Centuries* (*f*), "that a gift of any thing without a consideration is good, but it is revocable before the delivery to the donee of the thing given. *Donatio perficitur possessione accipientis.*" And agreeable to this, Sir *William Blackstone*, in defining a gift, says, "a *true* and *proper* gift is always accompanied with *delivery* of possession (*g*), and takes effect immediately. *But if the gift does not take effect by delivery* of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration."

In the latter observation, Sir *William Blackstone* differs from *Grotius*, who considers a gift, as an act of a different species from a contract; for *Grotius* says, "all acts, advantageous to others, *except those which are of mere generosity*, are called contracts (*h*)," and that, "in all contracts Nature demands an *equality*." But it is immaterial to our question, whether a

(*f*) *Jenk. Cen.* 109.

(*g*) 2 *Black. Com.* 441.

(*h*) *Gro. Book 2. Cap. 12. Sec. 7.*

gift, not accompanied by a delivery, be or be not a contract, if being a contract, it still is of a nature which does not impart a *strict* right, by which the giver may be *forced* to perform his engagement,

Gifts or donations are of several kinds, but there are two species immediately obvious. Gifts or donations *inter vivos*, and gifts *mortis causa*. The nature of the former, I have already pointed out. A gift of the latter kind, namely, a gift in consideration of death, is (according to *Swinbourne's* definition) where, a man *moved with the consideration of his mortality*, doth give and deliver something to another, to be his, in case the giver die; or otherwise, if he live, he to have it again.

Of gifts in the case of death, there be three sorts (*i*). One when the giver, not terrified with fear of any present peril, but moved with a general consideration of man's mortality, gives any thing. Another, when the giver being moved with immediate danger, doth so give, that straightways, it is made his to whom it is given. The third is, when any being in peril of death, doth give something, but not so that

(*i*) *Swinb.* 22, 23.

it shall presently be his that received it, but only in case the giver die. The two former of these kinds of gifts, if the giver do not make express mention of his death, are reputed simple gifts, and so cannot be revoked, but take full effect from the time of making the gift; but the latter is of a qualified nature, depending upon the death of the party.

But in donations *mortis causa* (*k*), as well as donations *inter vivos*, delivery seems to be a *necessary* and indispensable incident.

As a delivery is an incident indispensably necessary to a gift or donation, it follows, that nothing can be the subject of it which is not capable of being delivered, and therefore the solution of the question, whether a mortgage of lands or stock can be the subject of a gift, must depend upon another question, namely, whether it can be delivered? And in order to ascertain that, we must examine into what the ingredients are of which a mortgage is composed. A mortgage, generally speaking, is made up of a debt, and a pledge for securing it, each

(*k*) Ashton *v.* Dawson, Sel. Ca. Chan. 14. Jones *v.* Selby, Pre. Chan. 300. Drury *v.* Smith, 1 P. Will. 404. Ward *v.* Turner, 2 Vez. 431.

of which we have seen the law recognizes, as separate and distinct from the other. The debt is clearly a *chuse in action*. The security is land or stock, &c. vested in possession in the mortgagee. Now it is perfectly clear that the debt, being a *chuse in action*, or right to recover what the debtor is under an obligation to pay, cannot in itself be the subject of a delivery, for it is an incorporeal thing, and corporeal things alone have the capacity of being actually delivered; nor is it transferrable by the law of *England*, being but a right of action vested in the creditor to recover his debt. It is equally evident that the possession of the security, if it be land, vested in the mortgagee, cannot be divested since the statute of frauds, but by a formal conveyance in writing proper for that purpose; for a mortgage is a lien, and an estate in the land; and therefore, by a devise of land mortgaged, nothing passes in point of law, but the equity of redemption, if it is a mortgage in fee; if for years, the reversion and equity of redemption passes; and if it be stock, a formal transfer will be necessary to divest the possession out of the donor, and if the act done leaves the possession in the donor, it can take nothing out of him at law, nor in equity, unless it gives an equitable remedy on the foundation of a trust.

Then

Then as the debt, being a *chose* in action, is incapable of being transferred at law, and as an incorporeal right is not susceptible of delivery; if it passes at all by delivery of the mortgage deeds, it must pass as an incident following its principal the mortgage; but the fact is otherwise, for the debt is the principal and the land the incident. But if that were not the case, and the security were the principal, it is clear a mere gift, with a delivery of the deeds without writing, would not divest lands or transfer stock at law. Therefore, at law, neither the debt nor the security, it seems to me, can be the subject of a gift or donation.

Then let us consider how the case will be in equity. It may perhaps be contended, that as a delivery of the title-deeds of an estate, or of mortgage deeds, by way of security, is considered as an equitable mortgage or assignment, so a delivery of such deeds, by way of gift, may amount in equity to a delivery of the thing given; but these cases turn upon distinct principles. It appears to me, that there can be no such thing as an equitable gift or donation, which is not also a legal gift or donation. When a Court of Equity considers a deposit of deeds as an equitable mortgage or assignment
of

of a mortgage, it reasons by a circuity. It first considers the transaction as in the nature of an executory agreement or contract, by which the person who makes the deposit, makes himself a trustee for the person with whom he contracts, by operation of law, in consideration of an equivalent, and then inforces that trust as an implied trust, which is clearly out of the statute of frauds. But this reasoning does not apply where there is no equivalent; for there, if it be a contract, it is *nudum pactum*, and, for want of a consideration, gives no civil right which can be maintained in equity, though it may raise a moral obligation on the part of the donor to fulfil his engagement.

The only case in which a Court of Equity seems to have given countenance to an equitable donation, *mortis causa*, is that of *Baily and Snellgrove*, cited in *Vezey* (*l*), and determined by Lord *Hardwicke* in 1744, where a bond was given in prospect of death. The manner of gift was admitted, the bond was delivered, and it was held a good donation *mortis causa*. But Lord *Hardwicke* gives his reasons for that determination in the case of

(*l*) 2 Vez. 441.

Ward

Ward and *Turner* (m), and clearly distinguishes that case, and rests it on grounds peculiar to the nature of a bond; for he says, that though it be true that a bond, which is a specialty, is a *chose in action*, and its principal value consists in the thing in action, yet *some property* is conveyed by the delivery, for the property is vested, and to this degree that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a *profert in curia*. Another thing (says his Lordship) which makes it amount to a delivery, is, that the law allows it a locality, and therefore a bond is *bona notabilia*, so as to require a prerogative administration, where a bond is in one diocese and goods in another. But even in this case Lord *Hardwicke* expresses his doubts, whether he had not gone too far.

But the reasoning, in the above case, does not at all apply to the case of a gift of a *mere* mortgage with delivery of mortgage deeds, for

(m) 2 Vez. 431.

that

that clearly neither conveys a property, nor vests any interest, at law, in the donee; though the person to whom such mortgage deeds are given should cancel, burn, or destroy them, the estate mortgaged will still continue vested in the first mortgagee, and he may maintain an action of ejectment, and, on proving the existence and destruction of the deeds, give parol evidence of their contents. And I should presume, that the debt being the substance, is transitory, and has nothing to do with the locality of the mortgage deeds.

Then if the case of a bond, though a *chose* in action stands upon its own bottom, and by no means turns upon the validity of a delivery of a *chose* in action; and the question as to a gift of a mortgage, by delivery of the mortgage deeds, be a new one, it is hardly to be presumed that a Court of Equity, had it the power, would *now* be inclined to show any favour to such disposition; because, so far as it is admitted, it will militate directly against the statute of frauds, and introduce all the mischiefs of nuncupative wills, both of which are strong reasons against supporting such gift upon the foundation of a symbolical delivery by delivery of the deeds. But should such Court be so

so disposed, I should presume it would be under an incapacity of effecting its purpose; for upon revising the proceedings and developing the principles on which these Courts act, it will be found that they have never assumed the power of dispensing with any of the incidents annexed to the alienation of property directly, which must be done to introduce the notion of a symbolical delivery in lieu of the *actual* delivery, *inseparably* incidental at law to a *gift*; nor have they considered themselves as warranted to control the conscience of parties, except where trust, fraud, or accident, have given them jurisdiction over it, neither of which circumstances seem to me to occur in the case in question, which is merely an instance of an imperfect alienation, and resembles the case of a feoffment without livery of seisin; or a will of real estate, not duly attested, neither of which can be aided in chancery.

Where a man agreed to buy an estate (*n*), which was in mortgage for a gross sum, of which he covenanted to pay 8*l.* to the mortgagee, and the rest, being 4*l.* to the owner of the estate; the purchaser dying, it became a question, whether the heir at law could come

(*n*) Parsons *v.* Freeman, Ambler 115.

into

into a Court of Equity, and have the real estate exonerated by the personal estate? and Lord *Hardwicke* was of opinion that he might, for two reasons: First, because it was an express contract to pay, and the representative of the mortgagor might maintain an action for the money, and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money. Secondly, because it being agreed to be part of the purchase money, the heir would (if there was nothing more in the case) be entitled to have the money paid out of the personal estate; as where one articed to purchase an estate, and died before the purchase was completed.

If a man owes two debts (*o*) of the same nature, and pays a sum of money generally, he, the creditor, may elect and choose to which debt to apply it, when, on payment, the debtor makes no distinction how he paid it; but where in such case the debts are of different natures, and one carries interest and the other does not, equity will presume that the debtor meant to discharge the former; because it is natural to suppose that a man will rather elect to pay off the money for which interest is due, than that for which no interest is payable.

(*o*) *Vid.* 2 Chan. Ca. 84.

Therefore

Therefore, where a man owed money (*p*) on a mortgage, and other monies to the same person on account, for which he was not to pay interest, and he made a general payment, without mentioning it to be in discharge of the mortgage, or of the money due upon the account ; it was taken to have been paid towards discharge of the money due upon mortgage.

But this reasoning will not hold good, where the debt bearing interest, and the other debt, are consolidated ; for in such case, they shall be presumed to be intended to be paid in equal proportions.

Thus where *A* (*q*) was indebted to *B* by bond, and *C* bound as surety for *A*, and *A* was likewise indebted to *B* by simple contract in other money ; *A* and *B* came to an account of both debts, and stated them *in toto* 8*l.* ; and *A* afterwards in satisfaction of his debt, made over to his creditor certain goods of less value, but there was no declaration, whether the sale or money for the goods was to be in part of the one debt or the other, but they were made over

(*p*) *Hayward v. Lomax*, 1 Vern. 24.

(*q*) *Perrie v. Roberts*, 2 Chan. Ca. 83. 1 Vern. 34.

generally; *C*, the surety, insisted that it should be taken as paid on the bond, and thereby discharge him. But *B*, the creditor, would have applied it as in satisfaction of the simple contract debt, for *A* was insolvent, and therefore otherwise he might lose his debt on simple contract, contending that he had a right to apply the general payment to what debt he pleased; and that it would be hard, where he had a just debt in law and equity, he should be expounded out of it by interpretation of a payment generally made. *Et per curiam*, this payment being pursuant to a precedent account of both debts, the payment shall be intended according to the account, namely, on both debts, and so shall be proportioned rateably on both debts. And an order of the Master of the Rolls, to that effect, was confirmed on the re-hearing.

Where there is a general power given or reserved to a person, to charge an estate with money for such uses, intents, and purposes, as he shall appoint; it makes it his absolute estate, and gives him such a dominion over it as will render it subject to his debts, and consequently liable to discharge a mortgage, notwithstanding an appointment pursuant to the power.

Thus,

Thus (*r*), where a settlement was made of copyhold estates by a father upon the marriage of his son, with a covenant that it should be free from any incumbrance; in consideration of which the son covenanted to re-convey part of the estate after the father's death, or to pay 300*l.* to such person as the father should appoint; the father had, a few days previous to the settlement, created an incumbrance of 300*l.* on the settled estates by mortgage; and afterwards he appointed the 300*l.* to his daughter and died; then the son brought a bill (among other things) to have the estate disengaged of the mortgage. *Et per curiam*, the plaintiff has a plain equity to have the estate disengaged of the mortgage, brought on it in fraud of the marriage agreement; then the question is, how far the 300*l.* charged on the estate disjunctively, is liable to indemnify the plaintiff? he is entitled to be reimbursed out of this 300*l.* and interest, if the father's estate is not sufficient. The son's covenant is part of the consideration moving from him, for the settlement made on him by the father, in fraud of which the incumbrance was made;

(*r*) *Troughton v. Troughton*, Vez. 86. Sc. 3 Atk. 656.

and the question is, whether any person claiming from the father shall take back this estate of 300*l.* out of it, without letting the son, who was a purchaser, have the benefit of the same agreement; which would be contrary to the rules of all agreements, that they must be performed on both sides. But it is said that this differs, because the intent was to provide for the sister of the plaintiff by this 300*l.* who stood equally in the light of a purchaser for a valuable consideration as the plaintiff; and that therefore, although the father has broke the covenant, yet this shall not be taken from the daughter, who must be put upon the same foot as children, from whom nothing can be taken; but resort must be had to the assets of the person making the settlement; and that is true: but here the appointment to the daughter is a secondary consideration only, it being for the father's benefit, who might have directed it to be paid to a stranger; by whom it could not then be claimed by voluntary appointment from the father, letting this incumbrance remain. It was like the case of a purchaser discovering an incumbrance, who should retain so much for it, as remained in his hands: And this 300*l.* being part of the consideration of the settlement, is in the same light. The father's other assets

must be first applied, and if not sufficient, the plaintiff is entitled to retain the deficiency out of the 300*l.* and the remainder only thereof ought to go to the appointee.

Where a power was given to raise money by mortgage, and exceeded in the execution, the Court of Chancery would not relieve the mortgagee, his adversary claiming under a valuable consideration.

This point occurred in the case of *Jenkins and Keymis* (*s*), there *K* being tenant for life, remainder to his son *C K* in tail, with remainder over, they, on the marriage of *C K* with *B* his first wife, in consideration of the marriage and portion, levied a fine and suffered a recovery to the use of *K*, the father, remainder to *T K*, and the heirs of his body upon *B* begotten, the remainder to the heirs of the body of *T K*, remainder over, with power for *K* by deed in writing to charge all and singular the estates with the payment of 2000*l.* *K* and *T K* afterwards, without reciting the power, made a mortgage by lease and release for securing 2000*l.* with interest. Then *K* died, and *B* also died,

(*s*) *Jenkins v. Keymis*, Hard. 395. 1 Lev. 150. 1 Chan. Ca. 103.

and *T K* married a second wife, by whom he had issue a son, and then died. And the money not being paid, the mortgagee brought an ejectment in the Court of Exchequer. And two questions were agitated, first, whether the conveyance by lease and release was a good execution of the power? secondly, if not, whether the settlement, as to the issue by the second marriage, was not voluntary and void against the mortgagee? It was agreed on the first question, that the lease and re-lease was a good execution of the power in point of form, notwithstanding it was by two deeds instead of one, and the son joined in the conveyance; but the question was, if this conveyance of a fee, redeemable upon payment not only of the 2000*l.* but also of interest, was good, or if not good for the interest it was good for the principal? And Sir *Matthew Hales* and the Court held, that it was not a good execution of the power; because by such means, the estate might be charged with a great sum of money, which would defeat the settlement. And the power was entire, and so ought the execution to be, and it could not be made good in part, and void for the residue *at law*. But *Hales* said, that perhaps there might be ground for equity to aid the execution as to the 2000*l.* And on
the

the second question, *Hales* inclined that the consideration of marriage, and a portion, might extend to all the estates in the settlement, and judgment was given for the defendant.

The mortgagee afterwards brought a bill in Chancery, to have the defect in the execution of the power supplied there, but could gain no relief (*t*) ; it being held there by *Bridgman*, Chancellor, that the marriage and portion of the first wife extended to the issue of the second, and that the father and son joining in the conveyance, and the power not being recited therein, it could not be intended to be done in execution of the power, but as owners.

A voluntary mortgage will be void as fraudulent against a purchaser for a valuable consideration, but such mortgage may become a good one, by being assigned for a valuable consideration.

Thus, in *Andrew Newport's case* (*u*), which was upon an assignment of a mortgage made by

(*t*) 1 Lev. 151. 2. 1 Chan. Rep. 103.

(*u*) *Andrew Newport's case*, *Skinner*, 423. Sc. by the name of *Smartle v. Williams*, 1 Salk. 245. 3 Lev. 387. Holt, 478. Comb. 247. *et vid.* *Prodger v. Langham*, 1 Keb. 486. Sid. 133. Pl. 7.

K, in 1759, and after by divers mesne assignments vested in *N*, as executor of *C*; it was objected, first, that it did not appear, that any money was paid upon the original mortgage, and that therefore it was fraudulent, and that it being fraudulent in the creation, though *C* paid a valuable consideration, yet this would not purge the fraud, and make it good against the defendant, who was a purchaser *bona fide*, and for a valuable consideration: *sed non allocatur*; for *Holt*, Chief Justice, said, that the first mortgage was good between the parties, and being so, where the first mortgagee assigned for a valuable consideration, this was all one, as if the first mortgage had been upon a valuable consideration, for now the second mortgagee stood in his place, and therefore was within the *proviso* of the stat. 27 Eliz. cap. 4. “*that no mortgagee, bona fide, and upon good consideration, shall be impeached by force of this act; but it shall stand in such force, as before the act made.*” And he said, if this *proviso* did not extend to this case, to what case would it extend?

In the last-mentioned case, a second objection was also taken to the assignment, upon the ground, that it was not made upon the land, which,

which, as the mortgagor was not a party, and the mortgagee was never in possession, it ought to have been; for though it was admitted, that the first assignment was good, upon the presumption that the mortgagor was in the nature of tenant at will to the mortgagee, and so his possession the possession of the mortgagee, yet, by the assignment, the will was determined, and the mortgagor was not tenant at will to the second assignee. But the objection was held, by *Holt* and the Court, to be bad; for though the mortgagor was not tenant at will to the second assignee, yet he was not a disseisor, but a tenant at sufferance, and if no disseisin was made, then no right was divested; and no disseisin could be made without a tortious entry, and here there was no new entry; and therefore, though he was tenant at sufferance, yet the mortgagee (his estate not being divested and turned to a right) might assign. And *G. Eyre*, Justice, said, that when a mortgagee for himself, his executors, administrators, and assigns, covenanted with the mortgagor, that he should enjoy and take the profits till default of payment, the covenant being for his assigns, this would rule the whole case, and he should be presumed tenant at will to all the assigns, as well as to the first mortgagee.

But,

But, if any act were done by a mortgagor in possession, under the clause that he shall enjoy until default of payment, which amounted to a disseisin, or divested the estate of the mortgagee, and turned it to a right, the assignee of a mortgage so circumstanced, would gain no estate by his assignment, and would be defeated in any attempt to gain the possession, until such tortious act was done away, and in cases which might be put, absolutely barred. As if a mortgagor in possession under such clause, were to make a disseisin by feoffment, and then levy a fine, followed by five years non-claim; this, I should presume, would be a complete bar to the mortgagee, and all claiming under him.

But, as great mischief would ensue, if the notion of disseisins against the intent of parties, by the accidental acts of tenants at will, were encouraged, the courts have set their faces against obstacles of this kind wherever they have occurred.

Thus, in the case of *Powseley and Blackman* (x), mentioned before in this treatise, and which arose on a special verdict in ejectment, it was stated, that the mortgagee did not enter

(x) *Powseley v. Blackman*, Cro. Jac. 659.

into

into the land mortgaged, and that the mortgagor, before any of the days of payment, let it for several years, rendering rent to himself, and died, and the lessee entered by virtue of the said demise, and took the profits, claiming nothing but the term, and at the end of the term surrendered up the lands to the lessor, and that the mortgagee afterwards made his will, and devised the estates in question; and, it being admitted that the mortgagor was only tenant at will or tenant at sufferance to the mortgagee, it became a question, whether his making a lease for years, and the lessee entering and paying the rent, and claiming nothing but the term, and after, in the end of the term, yielding up the possession to the bargainer, should be a disseisin; and if it were a disseisin, whether it was not purged by the re entry of the mortgagor, and his occupying it *in statu quo prius*, and reducing the inheritance to the mortgagee, so as he was not out of possession, and so his will good; *for on that fact the validity of it depended.* And as to this point, all the justices resolved, that when the mortgagor entered (as it should be conceived, upon the verdict, he did) if he were a disseisor before (as they did not agree that he was, because neither the lessor

for nor lessee intended to make any disseisin, the lessee claiming but his term) it was only a disseisin in the *lessee for years*; and when the term being expired, the bargainor re-entered, that purged the disseisin, and the mortgagor was in, as he was before, and the inheritance was re-vested in the mortgagee, and his will should be good. And therefore they held, that if tenant at will were ousted by a stranger, and he re-entered, he was tenant at will again to his lessor; for otherwise, it would be a mischievous case in many assurances, where the mortgagor being in, upon condition to pay at the end of the year, and in the interim, that the mortgagee should not meddle, and the mortgagor made a lease for half a year, and after re-entered before the day of payment, that the mortgagor should be a disseisor against his own intent, and the intent of the mortgagee, and that the mortgagee should be said to be out of possession, so as he could not make a bargain and sale at his will. By this means many assurances would be destroyed, which the law would not suffer. Wherefore the law accounted, that the mortgagor by his entry was in of his former estate, and that the will of the mortgagor was good.

And

And in the case of *Blunden and Baugh* (*y*), which arose afterwards, it was held, such underlease by lessee at will, would not make a disfeis in against the lessor *nolens volens*.

There *H* being seised of land in tail, by indenture covenanted, in consideration of marriage between *W* his eldest son and heir, and *E*, to suffer a recovery of certain lands to the use of the said *W* and *E*, and the heirs male of the body of *W*, with divers remainders over. The marriage took effect, and *W* entered by the assent of his father and occupied at will; and afterwards by indenture demised the land to *A* and *B* for twenty-one years rendering rent. The lessees entered, and were possessed, and they being so possessed, the father and son by indenture covenanted with *D* and others (for that the said settlement was not executed, for the performance of the assurances and uses comprised therein) to levy a fine of those lands, amongst other uses, to secure a jointure to *E*, which fine was levied accordingly. Then *W* (the son) died without issue male of his body; afterwards *A* (one of the lessees) died; and then *B*, the other lessee, by indenture inrolled within six months, in consideration of a competent

(y) *Blunden v. Baugh*, Cro. Car. 302.

sum of money, bargained and sold the lands to *C*, then son and heir apparent of *H*, and to his heirs. Afterwards *H* (the father) died, and *C* (the son) entered, upon which the jointress entered; and on an ejectment brought by *C* to recover the possession, judgment was given in the Common Pleas by three judges against one for the plaintiff the son; but on writ of error in the King's Bench, it was held by three judges against one, that the judgment was erroneous. The main question was, whether by any of these acts there were a disseisin committed to *H* *no-lens volens*? and if there were a disseisin, who should be the disseisor and tenant to the freehold? And as to the first point, *Jones, Berkeley*, and *Croke*, held, that the law would not impute nor construe it to be a disseisin, unless at the election of *H*, when none of the parties intended it to be a disseisin, nor to oust him of the possession; for as *Coke, Littleton*, (153) defined it, *a disseisin was where one entered intending to usurp the possession, and to oust another of his freehold*; therefore the Court were to enquire, *quo animo hoc fecerit*, why he entered and intruded? and it was at the election of him to whom the wrong was done, if he would allow the wrong-doer to be a disseisor, or himself out of possession. *Tenant at will*,

they said, was at the will of both parties, and the will should not be determined by every act. And they cited and approved the case of *Powseley* and *Blackman* (z); and they said, that it should not be intended, that the son intended to disseise his father, but that the lease was made by the assent of the father; also the party to whom the lease was made, did not claim any freehold, but to have the lease only, and to pay his rent, and paid the rent accordingly; so there was no intent in any of the parties to make a disseisin; then the law should not construe it to be a disseisin *partibus invitisi*. And that hereby it followed, that the freehold remained in *H*, until the fine levied by him and his son *W*, and so the uses thereof were well raised, and the jointure well assured. But they held farther, that if there were a disseisin committed by these acts, *W*, who made the lease, was the disseisor and tenant, *quo ad* all persons, but the first lessor, but *quo ad* the first lessor, they both were disseisors; for when tenant at will took upon him to make a lease, which was a greater estate than he might make, that act was a *disseisin*, and by this lease for years made, and the lessees entering and paying the rent unto him,

(z) *Supra.*

and

and he accepting thereof, he was in as lessee, and the lessor was the disseisor, and had the reversion expectant upon this lease; and this lease betwixt them, was an interest derived out of the inheritance, gained by this disseisin; for if a lessee for years made a feoffment, although it were a disseisin to the lessor, yet it was a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee was in the *per*, and warranty might be annexed to such an estate upon which he might vouch. And if such lessee for years or at will, made a gift in tail, or a lease for life, that created a good lease, or a good gift in tail amongst themselves, and all others besides the first lessor, and as to him they were both disseisors. Then when lessee for years entered according to the lease, and paid his rent, the freehold betwixt them should be in *W*, who made the lease, and not in the lessee; and then the fine levied by *H*, and *W* his son, conveyed well the freehold, and the uses were well raised upon this fine, and the jointure well settled. And on these grounds they held, that the judgment ought to be reversed, and the majority of the judges agreeing with them, it was reversed accordingly.

In *Andrew Newport's case* (*a*), before-mentioned, it was contended, that though the mortgagee was not out of possession by the assignments, yet he might be out of possession in that case at his election, and that he had made his election there to be out of possession, for he had brought an *ejectione firmæ*, and by it admitted himself to be out of possession, for the ejectment complained of a tortious *entry*, and an *ouster*, and this being a matter of law, he was estopped to alledge the contrary, *sed non allocatur*; for *per curiam*, an ejectment, as it was in common practice, was but a feigned action, to which the lessor of the plaintiff, who was the principal person, was not a party; and not being a party, this could not be given in evidence as an estoppel against him; and therefore he could not maintain an action for the mean profits, without an actual entry, but the lessee might; and it had been ruled, that the bringing of an ejectment, was not such an entry or claim, which should avoid a fine and non-claim for five years.

But, if the mortgagee enter upon the mortgagor, and he re-enter, this will be a determi-

(*a*) *Andrew Newport's case*, Skinner, 423, 424. *et vid.*
Smartle v. Williams, *supra*. 1 Salk. 245. 3 Lev. 387.
Holt, 478. *Comb.* 245.

nation of the will (*b*), and the re-entry of the mortgagor a merely tortious entry, in which case an assignment by the mortgagee without a re-entry would not be valid.

So, if the mortgagee or his assignee, by his manner of pleading, were to admit a disseisin, the assignment must be made on the land, or it would be bad.

A question arose in the case of a bankruptcy, (*c*) between the assignees of a bankrupt and a mortgagee of the brew-house, whether the fixtures passed by the mortgage on the following facts: In 1745, *R* sold the utensils of a brew-house, and let a lease of the brew-house, to *B*; and in 1746, mortgaged his brew-house, with the appurtenances, &c. to *I S.* *B*, after this, sold his lease and utensils to *W*, who, for a sum of money in 1748, mortgaged the whole to *R*; afterwards *R* became a bankrupt, and his effects were vested in *Q*, as assignee under the commission, who, as standing in the place of the bankrupt, was entitled to the mortgage from *W*, and by virtue thereof claimed the utensils.

(*b*) *Per Holt*, in *Smartle v. Williams*, as reported, Ca. T. Holt, 478.

(*c*) *Ex part. Quincy*, 1 Atk. 477.

I S, the mortgagee of the brew-house, in 1749, insisted, that the fixtures passed by his mortgage (*d*) ; a petition was therefore preferred to the Chancellor for a delivery of all the utensils.

Et per curiam, this is a case for a mere action at law (*e*), and might be determined by action of *trover* or *detinue*. I am inclined to think, it was not the intent of *R* to mortgage the utensils ; for there is some description generally of things in a brew-house. The manner of describing the parcels, shews, that he did not at all mean to mortgage the utensils, for the word *appurtenances* seems to intend only things belonging to out-houses.

The rule as to fixtures, as between an heir and executor, is another thing (*f*). The freehold descending on the heir, the executor cannot enter to take away fixtures, without being a trespasser. But there is another rule between landlord and tenant ; during the term a tenant may take away chimney-pieces and even wainscot, which is a very strong case, but not after the term ; if he did, he would be a trespasser.

(*d*) *Ex part. Quincy.*

(*e*) *Ibid.*

(*f*) *Ibid.*

A mortgage, it is said, is a purchase, but then it is a redeemable one. How does it stand between a purchaser and a vendor? If a man sells a house, where there is a copper, or a brew-house, where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass. But then another question will arise; what action can you bring? For where things are fixed to the freehold, an action of *trover* will not lie for them. Several sort of things are fixed to the freehold, and yet may be taken away, as beds fastened to the cieling with ropes, nay, frequently nailed, and yet no doubt, but they may be removed. The difficulty with me is, the possession of the mortgagor; but that is cleared up, because it was the express agreement between the parties, that the mortgagor should not be prevented from coming on the brew-house. I apprehend the sale of the utensils was a defeasible sale, to revert to the *mortgagor*, the bankrupt, at the end of the term; and if so, there is an equity in the grantor, and therefore, as to the mortgagee, a possession in the bankrupt. Let it stand over to the next day of petitions, and let the mortgagee produce all deeds and writings, and the assignee at his expence to take copies, if he pleases.

Upon

Upon a bill in equity the case was, that the defendant *W* had mortgaged lands to the other defendant, and then articed with the plaintiff *H*, to sell him the said land free of all incumbrances for 250*l.* of which 50*l.* were actually paid to the defendant *W* (*g*). Afterwards *W* released to *R* the condition and power of redemption, and pending the same bill, released to the said *R*, the mortgagee, all his right in and to the lands; but no money or other valuable consideration appeared to have been paid or given for either of these releases; and the Court held, that neither of them ought to obstruct the conveyance to *H* by *W*; because they were given without any valuable consideration, and one of them pending this suit; and that both these releases ought to be set aside, as to the plaintiff.

But in the last case the Court doubted (*h*), whether, upon the bill as framed, the defendant *R* could be compelled to convey his estate to the plaintiff, upon the payment of what was due upon the mortgage and interest; because the bill prayed only a discovery against *R*, and that *W* should make the assurance, and to be

(*g*) *Hill v. Worsley and Rogison*, Hard. 320.

(*b*) *Ibid. Sed vid. Brēnt v. Best*, 1 Vern. 69. et sc. infra.

relieved in the premises, and no conveyance from *R* was required.

Where an equity of redemption is purchased in by several persons interested in a mortgage, it shall enure to the mortgagees in the same manner as they hold the mortgage.

And, therefore, where a man having a mortgage for years, by his will (*i*), devised all his personal estate, of what nature soever, to his executors, in trust for the payment of his debts, and afterwards devised the residue and overplus of his said personal estate to his two daughters, *equally to be divided between them*, and died; and, the debts being satisfied, the daughters contracted with the mortgagor for the purchase of the equity of redemption, and inheritance of the mortgaged estates to them and their heirs, and articles were executed on both fides accordingly; and a decree obtained for a specific execution. One of the daughters, after the death of the other, claimed the whole inheritance by survivorship, as a jointtenancy; and the question on a bill filed by the devisee of the deceased daughter was, whether this purchase of the inheritance were a jointtenancy, or a te-

(*i*) *Edwards v. Fashion*, Pre. Chan. 332.

nancy

nancy in common? And it was decreed to be a tenancy in common; for so was the mortgage devised to the two daughters, whereon this purchase of the equity of redemption and inheritance was founded; and therefore they, having several and distinct interests, as tenants in common of the mortgage, and paying an equal proportion for the purchase of the equity of redemption and inheritance, should have that in the same manner.

Where an executor bought an equity of redemption of an estate, on which a testator had a mortgage, it was considered as assets, and liable to legacies (*j*).

Trustees, to preserve contingent remainders in a marriage settlement, there being no issue, were decreed to join in a sale, a foreclosure being threatened.

In the case to which I allude (*k*), *S* made a mortgage of the lands in question, for the term of 1000 years, to secure 1000*l.* and interest, and afterwards upon his marriage settled these lands thus in mortgage, to the use of himself for life,

(*j*) Ryall *v.* Ryall, 1 Atk. 59.

(*k*) Platt *v.* Sprigg, *et al.* 2 Vern. 303.

remainder to the use of trustees during the life of the husband, to support contingent remainders, remainder to the wife for life, remainder to his first and other sons in tail, remainder to his own right heirs; and having no issue, articed to sell these lands to *P*, who brought his bill in equity, and set out these matters, and that the trustees refused to join, and that the mortgagee threatened to enter, and prayed a specific execution of the agreement, and that the trustees might join in the conveyances. *S* and his wife by answer set out the settlement, and that they had been married six years, and had no issue, and confessed the contract with *P*, and were willing to perform it. The trustees set out the marriage settlement, and were willing to do as the Court should direct, being indemnified. For *P*, it was insisted, that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might not only enter, but foreclose, which would bind, though there should be issue afterwards born. And that the husband and wife not being able to redeem, a sale was absolutely necessary, otherwise the benefit of redemption would be lost, as well to the husband and wife, as also to the issue, in case there should be any. And the Master of the Rolls decreed the trustees to join
in

in a sale, and to be indemnified, the settlement being only of an equity of redemption, and the wife being in court and examined, whether she freely consented thereunto or not.

Where one devises lands mortgaged to one for life, remainder over, the money, if the lands are redeemed, shall be apportioned.

And, if the claims of the parties are before the Court, it will adjust them, without a specific bill for that purpose.

Thus (*1*), where one having mortgaged unto *B*, part of his copyhold lands in fee, being customary lands of inheritance, *B* surrendered them to the use of his will, and devised them to his wife for life, remainder to *C* in fee, and made his wife executrix, a bill being pending to redeem, to which tenant for life and the remainder-man were defendants; it was prayed on behalf of *C*, that if the mortgagor redeemed, *C* might have a proportionable share of the redemption money, according to the value of the estate he had in the land. And the matter, in fact, appearing to be so upon the pleadings,

(*1*) *Brent v. Best*, 1 Vern. 70.

although

although *C* had no cross bill for the purpose, nor had so much as insisted upon it in his answer, it was ordered by the Lord Chancellor, that *C* should have his proportionable share of the redemption-money. And the ordinary rule of the Court, in such case, was said to be, that one-third of the money should be paid to the tenant for life, and the two-thirds residue to the remainder-man.

Where one mortgaged his estate to *F* (*m*), who paid no money in consideration of the mortgage, but gave the mortgagor a bond for 130*l.* the mortgagor afterwards made the mortgagee his executor and died. Then the heir of the mortgagor, brought his bill to have the real estate exonerated, considering this bond as assets in the hands of the defendant. And so it was held to be; for notwithstanding, at common law, the making an obligor executor, extinguishes his debt, yet, in this case, the bond shall be considered as assets in the hands of the defendant the executor, and applied, for the payment of funeral expences and legacies, to the exoneration of the real estate in favour of the heir.

(*m*) *Fox v. Fox*, 1 Atk. 463.

Where

Where a mortgage is made by baron and femme, and there is a covenant to levy a fine, and the fine is covenanted to be levied of a certain term, if the fine be not levied by the time in which it is covenanted to be levied, it seems that it will not strengthen the deed of mortgage, if any other uses be declared by a subsequent deed.

This question occurred in the case of *Fleetwood* and *Templeman* (*n*). There, a man and his wife, in the year 1692, made a mortgage of the wife's estate of 40*l.* *per annum*, for the sum of 789*l.* and covenanted in the mortgage deed to levy a fine of the estate in the *Easter Term* following. The fine was not levied till *Trinity Term*, in the year 1695; then, in consideration of 10*l.* more, they joined in a conveyance of the equity of redemption to an assignee of the mortgagee, and covenanted, that the fine theretofore levied, should be to the uses of this deed; afterwards the husband being dead, the wife, the estate being increased in value, filed her bill to redeem; and one ground, on which she founded her claim, being the inva-

(*n*) *Fleetwood v. Templeman*, 2 Atk. 80. Barn. Chan. Rep. 187.

lidity of the latter deed to declare the uses of the fine, Lord *Hardwicke* said, that he was inclined to think, as the covenant to levy the fine was confined to *one* particular term, and was not levied till the next term after, that the husband and wife might, by the deed in 1695, covenant that the fine theretofore levied should be to the use of the latter deed, and the former deed in 1692, might be laid out of the case, as the covenant under it, for levying the fine in *Easter Term*, was not strictly pursued. But it is said in *Barnardeston's Reports*, that his Lordship said, he would not determine the case upon this point only, but upon the whole circumstances, which he did accordingly against the mortgagor.

The *ceftui que trust* of things mortgaged, is answerable, if his trustee produce them not on application to redeem; and that as well where he is constituted trustee by inference of law, as where he is appointed by the positive act of the party.

Thus, where *P*(o), whose executor the plaintiff was, being possessed of certain pieces of

(o) *Perkins v. Avery, Brown and Baker, 2 Ch. Ca. 226.*

hang-

hangings, put them into the hands of *A*, an upholsterer, to sell for him; but having occasion for money, desired *B*, who was a scrivener, to lend him 500*l.* on the hangings, which he did, having previously enquired of *A*, as to their value. And afterwards *P* borrowed on the hangings 100*l.* more, and gave a judgment also for the debt with interest, the hangings being still in *A*'s hands. The money lent belonged to *C*, for whom *B* dealt as a scrivener, but neither *P* nor his executor knew that, nor did *C* appear therein, though the securities were in his name. *A* sold the hangings privately at an under value. *B* and *C* pretended ignorance of the sale; but *A*, after the sale, desired the plaintiff, the executor of *P*, to sell them, who refused so to do, unless he might first see them. The plaintiff paid the money borrowed and interest, and the securities were thereupon delivered up to him by *B*, in whose hands they had always been, but the hangings being sold, could not be had; and *B* said, he had nothing to do with *A*. Hereupon the plaintiff, the executor of the mortgagor, exhibited his bill in Chancery against *A*, *B*, and *C*, to have the hangings or the value in money. And it was decreed, that the defendants should pay the money. Then *B* and *C* petitioned for a rehearing, and that the decree might

might be explained as to them only; for that there was no reason to charge them, as they did not put the hangings into *A*'s hands, but they were placed in *A*'s hands by *P*, with power to sell them, and therefore they (*B* and *C*) ought not to be charged by *A*'s default. But the *Lord Chancellor*, on long debate, affirmed his former decree; for by the sale and mortgage, *P* divested his property, and the goods became *B*'s, and *A* became trustee for *B*, and *B* must answer for his trustee *A*, who sold them after the mortgage. And though *B* pretended to act as a scrivener only, and as an agent to lend *B* money, they were to be looked on as one person as to the plaintiff, for the scrivener keeping the securities for *B*, *B* trusted him thereby with all, and he had power to dispose of the monies, and he undertook the same by keeping the securities, and should be answerable as *B*.

Lord *Hardwicke*, Chancellor, said, in the case of *Lucas and Seale* (p), that where there are several executors, and one of them is indebted to the testator, for which he has given security by way of mortgage on his estate, if the co-executors are apprehensive that he is

(p) *Lucas v. Seale*, 2 Atk. 56.

insolvent,

insolvent, and that the estate may prove a deficient security, bringing a bill against him to foreclose is improper; because the testator having made him an executor, gives him an interest in the mortgage, the other executors should bring a bill for sale of the estate.

Where a mortgagor covenanted (*q*), after default, to make farther assurance, for the absolute sure making, &c. *Holt*, Ch. Just. said, the farther assurance must be absolute, but this should not oblige him to release his equity of redemption; and he said, a warranty was not to be inserted in such farther assurance.

Where a defendant pleads a mortgage (*r*), he ought to shew that the mortgagor being, or pretending to be, seised in fee of the premises, did make such mortgage, &c. otherwise the person undertaking to mortgage, may be a mere stranger, and have no interest in the premises, though he takes upon him to mortgage them.

Where the original deed of mortgage was lost, it was decreed, that the counterpart should

(*q*) *Atkin v. Urton*, Comberb. 318. 1 L. Raym. 36.

(*r*) 3 P. Will. 281.

be allowed as an *original*, and admitted as such at any trial, &c. (s)

The plaintiff and his wife brought their bill to redeem a mortgage of the wife's estate (t); the defendant put in a plea to the bill, which was over-ruled, for which 5*l.* costs was of course given to the plaintiffs; the defendant brought a cross bill to foreclose the wife, who being the surviving plaintiff in the original cause, moved the Court, that proceedings should stay in the cross cause, until the plaintiff, who was defendant in the original cause, had paid the 5*l.* costs due upon over-ruling the plea. It was objected on one side, that these costs must be intended to have been laid out by the husband in the original cause, and that, consequently, upon his death the same were lost. On the other side, it was insisted, that this original suit was in right of the wife, who being entitled to the equity of redemption, the husband joined therein only for conformity; and that the suit was not abated by the death of the husband, the order for costs being in nature of a joint judgment, which must survive to the wife;

(s) Briscoe, et al. v. Earl of Denbigh, et al. Finch,

237.

(t) Coppin v. ——, 2 P. Will. 497.

and

and that the sum for costs was certain by the course of the Court, though not expressed in the order. The Lord Chancellor for some time doubted, but afterwards taking it to be as a joint judgment for a sum certain, determined that it did survive to the wife; whereupon it was ordered, that proceedings should stay in the cross cause, until the defendant in the original cause should pay the *5l.* costs for overruling his plea.

the first or next, the
old will have to give way to the new
of business, though not so
evident as the change in
the old and new methods of
business, which will be
more apparent in the
new than in the old.
The new method
will be more difficult
and costly at first, but
will be more profitable
in the long run.

I.

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APPENDIX

OF

PRECEDENTS,

CONSISTING OF

1. *A Mortgage in fee for securing 6000l. and Interest.*
2. *A Mortgage by demise for securing a Legacy left by a Will, from the Executors under the Will to the Party lending the Money.*
3. *Mortgage of Leasehold and Copyhold Premises.*
4. *Assignment of a Mortgage Debt, and a Term of Years for securing the Same.*

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P R E C E D E N T S.

A Mortgage in fee for securing 6000l. and Interest.

THIS indenture, made the _____ day of _____
in the _____ year of the reign, &c. and in the
year of our Lord _____, between *S. R.* of &c. Esq.
of the one part, and *W. J.* of &c. of the other part,
witnessesth, that for and in consideration of the sum of Consideration.
6000*l.* of lawful money of Great-Britain, to him the
said *S. R.* in hand well and truly paid by the said *W. J.*
at or before the sealing and delivery of these presents,
the receipt of which said sum of 6000*l.* he the said
S. R. doth hereby acknowledge, and thereof, and of
and from every part thereof, doth acquit, release, and
discharge, the said *W. J.* his heirs, executors, and
administrators, and every of them, by these presents;
he the said *S. R.* hath granted, bargained, sold, aliened,
released, and confirmed, and by these presents doth
grant, bargain, sell, alien, release, and confirm, unto
the said *W. J.* (in his actual possession now being, by
virtue of a bargain and sale to him thereof made by
the said *S. R.* in consideration of 5*s.* by indenture
bearing date the day next before the day of the date
of these presents, for the term of one whole year,
commencing from the day next before the day of the date
of the same indenture of bargain and sale, and by
force of the statute made for transferring uses into pos-
session), and to his heirs, all that manor or lordship, Premises,
or reputed manor or lordship, &c. together with all
and singular the outhouses, tofts, cottages, buildings,
barns,

barns, stables, dovehouses, gardens, lands, tenements, feeding-places, pastures, timber and other trees, woods and underwoods, and the ground and soil thereof, commons, common of pasture, and other rights of common, heaths, marshes, ways, waters, water-courses, ponds, waters, waste-grounds, hawkings, huntings, fishings, fowlings, views of frankpledge, courts leet, courts baron and other courts, perquisites and profits of court, reliefs, heriots, escheats, fines, rents, and services, and rents reserved upon all manner of demises and grants, fee-farm rents, commons, fines, forfeitures, free warrens, goods and chattels of felons, fugitives and felons of themselves, deodands, *treasure trove*, waifs, estrays, and all other liberties, privileges, franchises, pre-eminentes, rights, royalties, immunitiess, profits, commodities, emoluments, and appurtenances whatsoever, to the said manor or lordship, or reputed manor or lordship, capital messuage, farms, lands, tenements, woods, wood-ground, and hereditaments, hereby granted, released, and confirmed, or intended so to be, or any of them belonging, or in any wise appertaining, or with the same or any of them held, used, occupied, possessed, and enjoyed, or accepted, reputed, deemed, taken, or known, as part, parcel, or member thereof, or as appurtenant thereto, in any wise howsoever; and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits, of all and singular the said manors and hereditaments hereby granted and released, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, use, trust, possession, property, claim and demand whatsoever, at law and in equity, or otherwise howsoever, of him the said *S. R.* of, in, and to the same, and every or any part or parcel thereof; *to have and to hold* the said manor or lordship, or reputed manor or lordship, capital messuage, farms, lands, tenements, woods, wood-grounds, and hereditaments, and all and singular other the premises hereinbefore mentioned, and hereby granted and released, or intended so to be, with their and every of their rights, members, and appurtenances, unto the said *W. J.* his heirs and assigns,

Haben.
dum.

assigns, to the only proper use and behoof of the said *W. J.* his heirs and assigns for ever; subject, nevertheless, to a proviso or condition for redemption hereinafter contained (that is to say), provided always, Mortgage and it is hereby agreed and declared, by and between proviso.

the said parties to these presents, that if the said *S. R.* his heirs, executors, or administrators, or any of them, do and shall, at or in the common dining-hall at Lincoln's-Inn, in the county of Middlesex, well and truly pay, or cause to be paid, to the said *W. J.* his executors, administrators, or assigns, the sum of 6000*l.* of lawful money of Great-Britain, on the —— day of

next ensuing the date hereof, together with lawful interest for the same, after the rate of 5*l.* for every 100*l.* for a year, without making any deduction or abatement thereout whatsoever, for or by reason of any taxes, assessments, or impositions, taxed, charged, affessed, or imposed, or to be taxed, charged, affessed, or imposed, by authority of parliament, or otherwise howsoever, upon the said manors, hereditaments, and premises, hereinbefore mentioned to be hereby granted and released, or upon the said principal sum of 6000*l.* and interest, hereby intended to be secured, or any part thereof, or on the said *W. J.* his executors, administrators, or assigns, in respect thereof, then from and immediately after such payment so made as aforesaid, he the said *W. J.* his heirs or assigns, shall and will, upon the request, and at the costs and charges of the said *S. R.* his heirs or assigns, convey and assure the said manor or lordship, or reputed manor or lordship, capital messuage, farms, lands, tenements, woods, wood-ground, rents, hereditaments, and premises, hereby granted and released, or intended so to be, as aforesaid, with rights, members, and appurtenances, unto and to the use of the said *S. R.* or his heirs, or unto such other person or persons as he or they shall direct or appoint, freed and discharged of and from all incumbrances made or committed by him the said *W. J.* his heirs or assigns, in the mean time. And the said *S. R.* for himself, his heirs, executors, and administrators, doth covenant, promise, and agree, to and with the said

Covenant
for the
payment
of mort-
gage.

W. J. his executors, administrators, and assigns, that he the said *S. R.* his heirs, executors, and administrators, shall and will well and truly pay, or cause to be paid, unto the said *W. J.* his executors, administrators, or assigns, the said sum of 6000*l.* with interest for the same, after the rate, and at the time, and in manner above limited for payment thereof, according to the true intent and meaning of the above-written

Covenant proviso. And the said *S. R.* for himself, his heirs, that mort- executors, and administrators, doth covenant, promise, gator is and agree, to and with the said *W. J.* his heirs and feised in assigns, in manner following; that is to say, that he fee. the said *S. R.* now, at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely, seised of the said manors or lordships, or reputed manor or lordship, capital messuages, farms, lands, tenements, hereditaments, and premises, hereinbefore granted and released, or mentioned or intended so to be, with their and every of their rights, members, and appurtenances, of and in a true, perfect, and indefeasable estate of inheritance, in fee simple, in possession, without any condition, trust, power of revocation, or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, charge, revoke, defeat, make void, lessen, or incumber the same. And also that he the said *S. R.*

Hath good right to convey. now hath in himself good right, full power, and lawful and absolute authority, to grant, bargain, sell, release, and convey, all and singular the said manor, hereditament, and premises, hereby granted and released, or intended so to be, with their rights, members, and appurtenances, unto and to the use of the said *W. J.* his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents.

And in default of payment mortgagee to enter and enjoy. And further, that in case default shall be made in payment of the said sum of 6000*l.* or the interest thereof, or any part thereof, contrary to the aforesaid proviso and covenant for payment thereof, that then, and from thenceforth, it shall and may be lawful, to and for the said *W. J.* his heirs and assigns, into and upon all and singular the said manor, hereditament, and premises, hereby granted and released,

or

or intended so to be, to enter, and the same from thenceforth peaceably and quietly to have, hold, and enjoy, and the rents, issues, and profits thereof, to receive and take, to his and their own use and benefit, without any lawful let, suit, trouble, hindrance, eviction, molestation, or interruption, of or by the said *S. R.* his heirs or assigns, or any other person or persons whomsoever; and that free and clear, and freely, clearly, acquitted, exonerated, and discharged, or otherwise, by the said *S. R.* his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from, and against, all and all manner of former and other gifts, grants, bargains, sales, mortgages, jointures, dowers, right and title of dower, uses, trusts, entails, wills, leases, statutes, recognizances, judgements, extents, executions, rents, arrears of rent, annuities, estates, titles, troubles, charges, and incumbrances whatsoever. And further, that he the said *S. R.* and his heirs, and *Covenant* all and every other person and persons having or claim-^{for further} ing, or who shall or may have or claim, any legal or *assurance.* equitable estate, right, title, trust, or interest, of, into, or out of, the said manor, hereditament, and premises, hereby granted and released, or intended so to be, or any part or parcel thereof, shall and will, from time to time, and at all times, after default shall be made of or in payment of the said sum of 6000*l.* and the interest thereof, or any part thereof, contrary to the aforesaid proviso and covenant for payment thereof, upon the reasonable request of the said *W. J.* his executors, administrators, or assigns, but at the proper costs and charges in the law of the said *S. R.* his heirs, executors, or administrators, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable act and acts, deeds, devises, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, releasing, assuring, and confirming, the said manor, hereditament, and premises, hereby granted and released, or intended so to be, with their rights, members,

But until
default of
payment
mortga-
gor to en-
joy.

members, and appurtenances, unto and to the use of the said *W. J.* his heirs and assigns, freed and discharged of and from the said proviso or condition hereinbefore contained for redemption of the said manor, hereditaments, and premises, and all other equity of redemption whatsoever, as by the said *W. J.* his heirs or assigns, or his or their counsel learned in the law, shall be lawfully and reasonably devised, advised, or required. And lastly, it is hereby declared and agreed, by and between the said parties to these presents, that in the mean time, and until default shall be made of and in payment of the said sum of 6000*l.* and interest for the same, as aforesaid, or some part thereof, contrary to the true intent and meaning of these presents, it shall and may be lawful, to and for the said *S. R.* his heirs and assigns, peaceably and quietly to have, hold, use, occupy, possess, and enjoy, the said manor, hereditament, and premises, hereby granted and released, with their rights, members, and appurtenances, and to receive and take the rents, issues, and profits thereof, to his and their own use and benefit, without the let, suit, trouble, hindrance, interruption, or disturbance whatsoever, of or by the said *W. J.* his heirs or assigns, or any other person or persons whomsoever, lawfully claiming, or to claim, by, from, under, or in trust for him, them, or any of them. In witness, &c.

A Mortgage by demise for securing a Legacy left by a Will, from the Executors under the Will to the Party lending the Money.

THIS indenture of three parts, made the _____ day of _____ in the _____ year of the reign, &c. and in the year of our Lord, &c. between *J. C.* of, &c. and *E. M. C.* his wife (which said *E. M. C.* is one

one of the daughters of *J. T.* late of, &c. deceased, by *M. T.* his wife), of the first part; the said *M. T.* of, &c. widow and relict of the said *J. T.* *J. B.* of, &c. *P. T.* of, &c. (which said *M. T.* *J. B.* *P. T.* were, together with *E. R.* named and appointed by the said *J. T.* executrix and executors of his last will and testament), of the second part; and *A. M. R.* of, &c. of the third part. Whereas the said *J. T.* in and Recital of by his last will and testament in writing, executed as a will. the law directs for the passing of real estates, and bearing date the _____ day of _____ which was in the year of our Lord _____, gave, devised, and bequeathed, all his real estate, and all his personal estate, of what nature or kind soever (except as therein is excepted) unto his wife, the said *M. T.* *J. B.* *P. T.* and *E. R.* their heirs, executors, administrators, and assigns; upon trust to sell and dispose of the same estates respectively as soon as possible after his decease, and the monies arising by sale thereof, together with all monies he should happen to die possessed of, or be entitled unto, at the time of his death, to invest in some of the public funds, or upon some real securities at interest, and to permit and suffer the said *M. T.* so long as she should continue his widow and unmarried, to receive the dividends, interest, and produce thereof, for the support of herself, and for the maintenance and education of his daughters *H. T.* *T. E. M. C.* (then *E. M. T.*) *E. T.* *U. T.* and the child, which his said wife was then *enfantine* with, or might thereafter have by him. And in case his said wife should marry again, then he directed that his said trustees should pay and apply the interest and produce of the monies thereinbefore directed to be invested in the funds, or upon real securities, as aforesaid, in the support, maintenance, and education, of all and every his said children, until they should attain their respective ages of 21 years, or be married. And if any of his said children should happen to marry before the age of 21 years, with the consent of his said wife, then he ordered and directed his said trustees, out of the monies so to be invested as aforesaid, to pay to all and every of his said children so marrying, with such consent

sent as aforesaid, the sum of 200*l.* as and for a marriage portion. And if his said wife survived him, and should, during her life, continue his widow, then he directed that she should have power, by any deed or writing to be by her duly executed in the presence of two or more credible witnesses, or by her last will and testament to be by her duly signed and sealed in the presence of three or more credible witnesses, to dispose of all the rest, residue, and remainder, of the said monies, so directed to be invested as aforesaid, to and amongst all and every of his said children, in such shares and proportions as his said wife should think fit. And in default of such disposition, or in case of his said wife's marrying as aforesaid, then he thereby bequeathed the said monies unto and amongst all and every of his said children equally, share and share alike: and he thereby appointed his said wife *M. T.* the said *J. B. P. T.* and *E. R.* executors of his said last will and testament. And whereas the said *J. T.*

**Appoint-
ment of
executors.**
**Recital of
the testa-
tor's
death.**

departed this life on or about the _____ day of _____ which was in the year, &c. without making any addition to, or alteration in, his said will. And (the said *E. R.* having renounced the execution thereof) the said *M. T. J. B.* and *P. T.* alone proved the said will in the proper ecclesiastical court of the Archbishop of Canterbury. And whereas the said *E. M. T.* now

**Recital of
the daugh-
ter having
attained
21.**

E. M. C. attained her age of _____ years on or about the _____ day of _____ which was in the year of, &c. _____ and a marriage hath since been had and solemnized between the said *E. M. C.* and the said *J. C.* by and with the consent and approbation of the said *M. T.* her mother, testified by her being a party to, and sealing and delivering these presents. And the said *J. C.* thereupon became entitled, in the right of the said *E. M. C.* his wife, to the sum of 200*l.* be-

**Recital of
a request
to pay the
money the
daughter
was enti-
tled unto
under the
will.**

queathed by the said will of the said *J. T.* And whereas the said *J. C.* hath applied to, and requested the said *M. T. J. B.* and *P. T.* to pay to him the sum of 200*l.*; but it not being at present convenient for the said *M. T. J. B.* and *P. T.* to pay down the said sum of 200*l.* (no purchaser having been found for the said testator's real estate, or any part thereof, notwithstanding

withstanding the same hath been offered to sale). They have therefore applied to, and requested the said *A.M.R.* to advance and lend the same 200*l.* which she has agreed to do on having such security made to her, the said *A.M.R.* for repayment of the said sum of 200*l.* and interest, as hereinafter is mentioned. Now this indenture witnesseth, that in pur-
suance and performance of the said agreement, and for Indenture
and in consideration of the sum of 200*l.* of, &c. on witnes-
or before the sealing and delivering of these presents
to the said *J.C.* in hand well and truly paid by the
said *A.M.R.* at the request, and by the direction and
appointment of the said *M.T.* *J.B.* and *P.T.* and
at the nomination, and by and with the privity and
approbation of the said *E.M.C.* (such request, direc-
tion and appointment, nomination, privity and appro-
bation, being respectively testified by the said *M.T.*
J.B. *P.T.* and *E.M.C.* being parties to, and re-
spectively sealing and delivering these presents), the
payment and receipt of which said sum of 200*l.* he the
said *J.C.* doth hereby acknowledge to be in full of
the said sum of 200*l.* so by the said will of the said
J.T. directed to be by the said *M.T.* *J.B.* *P.T.*
and *E.R.* paid as a marriage portion to the said *E.M.C.*
as one of the daughters of the said *J.T.* as aforesaid.
And of and from the same sum of 200*l.* and every
part thereof, they the said *J.C.* and *E.M.C.* his
wife, do acquit, release, exonerate, and for ever dis-
charge, as well the said *A.M.R.* her heirs, execu-
tors, administrators, and assigns, as the said *M.T.*
J.B. and *P.T.* and each and every of them, their,
and each and every of their heirs, executors, ad-
ministrators, and assigns, by these presents. And In confi-
also for and in consideration of 10*s.* a piece of deration
like lawful money, on or before the sealing and of 10*s.* to
delivery of these presents, to them the said *M.T.* each of
J.B. and *P.T.* in hand well and truly paid by the ex-
the said *A.M.R.* the receipt whereof is hereby
acknowledged, they the said *M.T.* *J.B.* and *P.T.*
at the request, and by the direction and appointment
of the said *J.C.* and *E.M.C.* his wife (testified by
their being made parties to, and respectively sealing
and

Words of and delivering these presents), have, and every of convey- them hath, granted, bargained, sold, and demised, ance.

Parcels. Parcels. messuage or tenement, &c. together with all ways, paths, passages, water-courses, rights, privileges, commodities, and appurtenances, to the said messuage, tenement, piece or parcel of ground, belonging, or in any ways appertaining. And the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, use, trust, inheritance, property, claim, and demand whatsoever of them the said *M. T. J. B.* and *P. T.* of, into, or out of, the same. To have

Haben-
dum for
200 years. and to hold the said messuage or tenement, and all and singular other the premises, hereby granted, bargained, sold, and demised, or intended so to be, with their appurtenances, unto the said *A. M. R.* her executors, administrators, and assigns, from henceforth for and during, and unto the full end and term of 200 years, to be computed from the day next before the day of the date of these presents. But subject nevertheless to the proviso and agreement hereinafter mentioned for redemption of the premises; that is to

Proviso
for re-
demption. say, provided always, and it is hereby declared and agreed, by and between all and every of the said parties to these presents, and the true intent and meaning of them and of these presents, nevertheless, is, that if the said *M. T. J. B.* and *P. T.* or either of them, their, or either of their heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, to the said *A. M. R.* her executors, administrators, or assigns, the said sum of 200*l.* of, &c. and the sum of 10*l.* of like lawful money, as and for a year's interest for the same, at the rate of 5*l.* for 100*l.* for a year, making together the sum of 210*l.* in the parts, shares, or proportions, and on or at the days or times, hereinafter mentioned; that is to say, the sum of 5*l.* part thereof (being half a year's interest for the said sum of 200*l.* at the rate aforesaid) on the _____ day of _____ next ensuing the date of these presents, and

and which will be in the year _____, and the sum of 205*l.* residue thereof, being the principal sum of 200*l.* and another half year's interest for the same, at the rate aforesaid, on the _____ day of _____ then next ensuing, without any deduction or abatement whatsoever, out of the same, or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, taxed, charged, assed, or imposed, on the said messuage or tenement, hereditaments and premises, hereby granted, bargained, sold, and demised, or mentioned or intended so to be, or upon the said sum of 210*l.* or any part thereof; or upon the said A. M. R. her executors, administrators, or assigns, in respect of the said sum of 210*l.* or any part thereof, by authority of Parliament or otherwise howsoever; or for, upon account, or in respect, of any other matter, cause, or thing whatsoever; then and in such case, she the said A. M. R. her executors, administrators, or assigns, shall and will, at any time after such payments shall be so made as aforesaid, upon the request and at the costs and charges of the said M. T. J. B. and P. T. or some or one of them, or the heirs, executors, or administrators of them, some or one of them, re-convey the said messuage or tenement, hereditaments and premises, hereby granted, bargained, sold, and demised, or mentioned or intended so to be, with their appurtenances, unto the said M. T. J. B. and P. T. their executors, administrators, or assigns; or as they, or some or one of them shall, in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed, by the said A. M. R. her executors, administrators, or assigns.

And the said I. C. doth hereby for himself, his heirs, Covenant executors, and administrators, covenant, promise, and for payment agree, to and with the said A. M. R. that the said M. T. J. B. and P. T. or some or one of them, or the heirs, executors, or administrators of them, some or one of them, shall and will, well and truly pay, or cause to be paid, unto the said A. M. R. her executors, administrators, or assigns, the aforesaid sum of 210*l.* entitled to at the day or time in the aforesaid proviso or agreement, mentioned or appointed for payment thereof, without

I

without any deduction or abatement whatsoever, according to the true intent and meaning of these presents. And the said *I C* doth, for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the said *AMR*, her executors, administrators, and assigns, by these presents, in manner following, that is to say, that they the said *MT*, *JB*, and *PT*, or some or one of them, are, or is, at the time of the sealing and delivery of these presents, lawfully and rightfully seized of, or entitled to, a good, sure, perfect, absolute, and indefeasible estate of inheritance, in fee simple, of and in the said messuage or tenement, and premises, hereby granted, bargained, sold, and demised, or mentioned or intended so to be, with the appurtenances thereunto belonging, without any condition, trust, power of revocation, or limitation of use or uses, or any other restraint, cause, matter, or thing, whatsoever, to alter, change, charge, lessen, encumber, determine, defeat, or make void, the same

And have estate; And that they the said *IC*, *MT*, *JB*, and good right *PT*, or some or one of them, now have or hath to convey. in themselves, himself, or herself, good right, full power, and lawful and absolute authority, to grant, bargain, sell, and demise, the aforesaid messuage or tenement, and premises, with the appurtenances, in the manner hereinbefore mentioned; and according to the purport, true intent, and meaning, of these presents. And that if default shall be made in payment of the said sum of 210*l.* or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents; then and in such case it shall and may be lawful, to and for the said *AMR*, her executors, administrators, and assigns, at any time or times hereafter, into and upon the said messuage or tenement, and premises, hereby granted, bargained, sold, and demised, or intended so to be, to enter, and the same from henceforth, for the then residue of the said term of 200 years, to have, hold, occupy, possess, and enjoy, with the appurtenances and the rents, issues and profits thereof, to have, receive

ceive and take, to and for his and their own use and benefit, without any let, suit, trouble, interruption, or disturbance whatsoever; of, from, or by, the said *J. C., M. T., J. B.,* and *P. T.*, or any of them, their, or any of their heirs, executors, or administrators; or any person or persons whomsoever, having, or lawfully or equitably claiming or to claim any estate, right, title, or interest, in, to, or out of, the said messuage or tenement, hereditaments and premises, hereby granted, bargained, sold, and demised, or mentioned or intended so to be, or any part or parts thereof, by virtue of or under the said recited will of the said *J. T.* or otherwise howsoever; And that free from and clear, and freely and clearly, and absolutely acquitted, exonerated, and discharged; or otherwise by the said *J. C., E. M. C., M. T., J. B.,* and *P. T.* their heirs, executors, and administrators, saved, protected, kept harmless, and indemnified, of, from, and against all, and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, statutes, mortgages, uses, wills, intails, annuities, rent-charges, rent, task and arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, and incumbrances whatsoever; And moreover, that if default shall be made, of or in payment of the aforesaid sum of *210l.* or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents then and in such case, they the said *J. C., M. T., J. B.,* and *P. T.* their heirs, executors, and administrators; and all other person and persons whomsoever having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, of, in, to, or out of, the said messuage or tenement, hereditaments and premises, hereby granted, bargained, sold, and demised, or mentioned or intended so to be; or any part or parcel thereof, shall and will, from time to time, and at all times hereafter, during the said term of *200* years, upon the request of the said *A. M. R.* her executors, administrators,

tors, or assigns, but at the costs and charges of the said *J. C. M. T. J. B.* and *P. T.* or some or one of them, their, or some or one of their, heirs, executors, or administrators, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances, and assurances, in the law whatsoever, for the further, better, more perfect, and absolute, granting, bargaining, selling, and demising, the said messuage or tenement, hereditaments and premises, hereby granted, bargained, sold, and demised as aforesaid, with the appurtenances for the then residue of the said term of 200 years, unto the said *A. M. R.* her executors, administrators, or assigns, as by the said *A. M. R.* her executors, administrators, or assigns; or any of them, or her, their, or any of their, counsel, learned in the law, shall be reasonably devised, advised, and required. Provided also, and it is hereby declared and agreed, by and between the said parties to these presents, and the true intent and meaning of them and of these presents is, that it shall and may be lawful, to and for the said *M. T. J. B.* and *P. T.* their heirs, executors, and administrators, peaceably and quietly to have, hold, occupy, possess and enjoy, the said messuage or tenement, hereditaments and premises, hereby granted, bargained, sold, and demised, or mentioned or intended so to be, with the appurtenances; and receive and take the rents, issues, and profits thereof, to and for their respective use, until default shall be made in payment of the said sum of 210*l.* or some part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance, of, from, or by, the said *A. M. R.* her executors, administrators, or assigns, or any other person or persons whomsoever, lawfully claiming or to claim, by, from, or under, her, them, or any of them, in witness, &c.

Power for
the mort-
gag-
ers to
receive
the rents
until de-
fault of
payment.

Mortgage

Mortgage of Leasehold and Copyhold Premises.

THIS Indenture of four parts, made the _____ day of _____ in the _____ year of the reign, &c. and in the year of our Lord, _____ between *B E K*, of, &c. widow and relict of *B K*, late of, &c. deceased, of the first part; *B K* of, &c. and *G F* of, &c. widow, late *G K*, spinster, which said *B K* and *G F*, are the two only children who have lived to attain the age of 21 years, of the said *B K*, deceased, by the said *B E K*, his now widow, and which said *B K* is also the sole executor and residuary legatee named in the last will and testament of the said *B K* of the 2d part; *T S* of, &c. the son and heir at law of *T S*, late of, &c. deceased, of the third part; and *D J* of, &c. of the fourth part. Whereas by indenture tripartite, bearing date on or about the _____ settlement, day of _____ and made, or expressed to be made, between the said *B E K* (then *B E D*, spinster), of the first part; the said *B K*, since deceased, of the second part; and *P W* and *M W*, both since deceased of the third part (being the settlement made, previous to, and in contemplation of, the marriage then intended, and which was soon after had, between the said *B K* and *B E D*), after reciting, that by indenture of lease, bearing date the _____ day of _____ 17_____, and made between *W D* of the one part, and *S D* of the other part; the said *W D* had demised and leased to the said *S D* all that piece or parcel of ground, &c. together with the new messuage or tenement to be erected and built on the said piece or parcel of ground, pursuant to the covenant therein contained; to hold to the said *S D*, his executors, administrators, and assigns, from the feast of _____ then next, for the term of 61 years, at the yearly rent therein mentioned; and reciting that the said *S D* had built a new brick messuage or tenement on the said piece or parcel of ground; and that the said *S D* was then since dead, having first made his will, and appointed the said *B E K* (then *B E D*) residuary

Whereby
leaseholds
were af-
signed.

And also
South Sea
annuities.

In trust
for the
wife till
marriage.

After
marriage
for her
separate
use.

After her
death be-
tween
children
of the
marriage
attaining
21.

The trust
of the
South Sea
annuities

A power
contained
therein to
invest the
stock in
the pur-
chase of
lands.

fiduciary legatee and sole executrix thereof, who had duly proved the same. It is witnessed, that for the considerations in the said indenture now in recital expressed, she the said *B E K*, with the approbation of the said *B K*, did bargain, sell, assign, and set over, unto the said *P W* and *M W*, the said recited indenture of lease, and all and singular the premises therein comprised, with the appurtenances, to hold the same unto the said *P W* and *M W*, their executors, administrators, and assigns, for the residue of the said term of 61 years therein. And it was, by the said indenture now in recital, declared and agreed, that the said *P W* and *M W* should stand possessed of the said leasehold premises, and also of the sum of ——l. New South Sea annuities, thereinbefore mentioned to have been transferred into their names in trust, and to and for the uses and purposes therein, and in part hereafter mentioned (that is to say), in trust for the said *B E D*, until the solemnization of the said then intended marriage. And from and after the solemnization thereof, then as to the said leasehold premises in trust, to permit the said *B E D* to receive and take the rents and profits thereof, for her separate use, during her life; and from and after her decease, then in trust for the issue of the said *B K*, by the said *B* his then intended wife, equally to be divided between them (if more than one), and to the survivors and survivor of them, attaining to the age of 21 years; and as to the said sum of ——l. New South Sea annuities, in trust to permit the said *B E D* to receive and take the dividends thereof for her separate use during her life; and from and after her decease, then in trust for the issue of the said *B K*, by the said *B* his then intended wife, equally to be divided between them, if more than one, and to the survivors and survivor of them attaining to the age of 21 years; and it was, in and by the said indenture now in recital, declared and agreed, that in case the said *B K* and the said *B* his then intended wife should be minded, or desirous to have the above-mentioned trust estates, or any part thereof, sold, and the money arising by such sale or sales placed out and invested in or upon any other stock or stocks, security

or

or securities, or in or upon the purchase of any lands or tenements ; and to be removed, varied, and sold, from time, as often as the said *B K* and the said *B* his then intended wife should be minded or desirous to have the same done ; then the said *P W* and *M W*, their executors or administrators should, when and as often as the said *B K* and the said *B* his then intended wife should signify the same in writing, under their hands, accordingly sell and dispose of the same, or so much thereof as should be required by any such writing ; and should, from time to time, invest and lay out the money arising by every such sale, upon some other security or securities in the funds, or elsewhere ; or in or upon the purchase of any lands or tenements, by and with the consent and approbation in writing, under the hands and seals of the said *B K* and the said *B* his then intended wife, from time to time, first had and obtained, which stock and stocks, security and securities, lands or tenements, that should or might be, from time to time, purchased, bought, or secured, by and with such consent and approbation as aforesaid, should, from time to time, be transferred, settled, and conveyed, to, for, and upon, the same trusts, uses, intents, and purposes, as were, in and by the said indenture now in recital, particularly settled and declared as aforesaid ; and to, for, and upon, no other use, intent, or purpose whatsoever. And whereas by indenture, bearing date on or about the _____ day of _____, and made, or expressed to be made, between *M W* and *S W* (executors of the last will and testament of the aforesaid *P W*, deceased, who of surviving the aforesaid *M W*) of the first part, the said *B K* since deceased, and the said *B* his then wife of the second part ; and the aforesaid *T S* (since deceased) and *H T*, also since deceased, of the third part. After reciting, among other things, the said hereinbefore recited indenture of settlement, of the _____ day of _____ 17_____, and the will of the said *P W*, It is witnessed, that in pursuance of, and in obedience to, a certain decree of the Court of Chancery therein recited, and in consideration of 5s. they the said *M W* and *S W* did bargain, sell, assign, transfer,

transfer, and set over, unto the said *T S* and *H T*, since deceased, their executors, administrators, and assigns, the said hereinbefore mentioned indentures of lease, from the said *WD* to the said *SD*, and all and singular the premises therein comprised, and all the estate, right, title, and interest, of them the said *M W* and *S W*, of, in, and to, the same, to hold the same unto the said *T S* and *H T*, their executors, administrators, and assigns, for the residue of the said term of 61 years therein in trust, nevertheless; and to and for the several uses, intents, and purposes, in and by the said indenture of settlement, the _____ day of _____ mentioned, expressed, and declared, touching and concerning the same. And whereas the aforesaid sum of _____ l. New South Sea annuities, was also in pursuance of the said decree of the Court of Chancery, mentioned in the said last recited indenture, afterwards transferred by the said *M W* and *S W*, unto or into the names of the said *T S* and *H T* (since deceased) in the transfer books, kept at the South Sea house, upon the trusts of the said hereinbefore recited indenture of settlement, of the _____ day of _____

Transfer
of the
stock to
the new
trustees.

Recital
that in
pursuance
of a power
in the set-
tlement, a
sum was
laid out in
the pur-
chase of
estates.

17—. And whereas, in pursuance of the aforesaid power in that behalf contained in the said indenture of settlement, the said *T S* and *H T* did, on or about the _____ day of _____ 17—, at the request and by the direction of the said *B K* and *B* his wife, sell and dispose of the said sum of _____ l. New South Sea annuities, and lay out the money thence arising in the purchase of the copyhold or customary messuages or tenements and hereditaments hereinafter described, holden of the manor of *T* _____ in the said county of Middlesex, and accordingly at a special Court Baron, held for the said manor, on the _____ day of _____ 17—, *H W*, one of the customary tenants of the said manor, duly surrendered into the hands of the said lord of the said manor, according to the custom thereof, all those his four customary messuages or tenements, &c. and also all that piece or parcel of land called, &c. and also all that slip of land, &c. to all, which said premises the said *H W* had, at a special Court Baron, held for the said manor, on the _____ day

— day of — 17 —, been admitted tenant by the descriptions therein mentioned, to the use and behoof of the said *T S* and *H T* (since deceased), their heirs and assigns; and the said *T S* and *H T* were thereupon, at the same Court, duly admitted tenants to the said copyhold or customary hereditaments, with the appurtenances accordingly, to hold to them, their heirs, and assigns, at the will of the Lord, according to the custom of the said manor, by the rights and services for the same due, and of right accustomed. And whereas the said *H T* died in the Recital of lifetime of the said *T S*, and the said *T S* died some time in the year 17 —, intestate as to the said copyhold, or customary messuages or tenements and hereditaments, leaving the said *T S* (party hereto), his son and heir at law; and at a Court Baron held for the said manor of *T*, on or about the — day of — 17 —; he the said *T S*, party hereto, was duly admitted tenant to all and singular the same copyhold, or customary messuages or tenements and hereditaments, with the appurtenances, to hold to him, his heirs, and assigns, at the will of the Lord, according to the custom of the said manor. And whereas by indenture of lease, bearing date on or about the — day of — 17 —, and made, or expressed to be made, between *W D* of the one part, and the aforesaid *B K*, since deceased, of the other part. In consideration of the surrender of the said indenture before mentioned or recited, he the said *W D* did demise, set, and to farm let, unto the said *B K*, all that piece or parcel of ground, with the two messuages or tenements, &c. together with their and every of their appurtenances, to hold the same unto the said *B K*, his executors, administrators, and assigns, from the feast of, &c. — then last, for the term of — years, at the yearly rent of — l. payable as therein mentioned, and under and subject to the covenants and agreements therein contained, on the tenants or lessee's part and behalf to be observed and performed. And whereas the said *B K* had issue by the said *B* his now widow, only having

and that three children, namely, *B*, who died under the age only two of 21 years, and the aforesaid *B K* and *G F*, parties attained hereto, who have attained their respective ages of 21 years. And the said *B K*, by his last will and testament in writing, bearing date on or about the Recital of a will.

_____ day of _____ 17_____, (here set out that part of the will that is necessary.) And the said testator appointed the said *B K*, his son, executor of And that his said will, and is since dead, without revoking the testator is dead or altering the same; and the said executor hath without revoking it, that duly proved the said will in the said Court of, &c. And whereas the said *B E K*, *B K*, and *G F*, have applied to and requested the aforesaid *D J* to lend and advance to them the sum of _____ l. which he the said *D J* hath consented and agreed to do accordingly, upon having the re-payment thereof with interest for the same, after the rate of four per cent, and have per ann. secured by a mortgage of all the aforesaid requested leasehold and copyhold messuages or tenements, hereditaments and premises, in the manner hereinafter expressed. Now this indenture, that for and in consideration of the sum of _____ l. of and by the said

D J to the said *B E K*, *B K*, and *G F*, in hand, well and truly paid, at or before the sealing and delivery of these presents, the receipt, whereof they do hereby acknowledge, and thereof and therefrom, and of and from, every part thereof, do respectively acquit, release, and discharge, the said *D J*, his executors, administrators, and assigns, by these presents, they the said *B E*, *B K*, and *G F*, have, and every of them hath, bargained, sold, assigned, transferred, and set over, and by these presents do, and every of them doth, bargain, sell, assign, transfer, and set over, unto the said *D J*, his executors, administrators, and assigns, all and singular the said piece or parcel of ground, messuages or tenements, and premises, comprised in the said hereinbefore recited indenture of lease, of the _____ day of _____ 17_____, and which were hereby demised to the aforesaid *B K* (since deceased), his executors, administrators, and assigns, for the term of _____ years as aforesaid, together with their and every of their appurtenances; and all the estate,

Indenture
witnes-
eth.

estate, right, title, interest, trust, term of years yet to come and unexpired, benefit of renewal, property claim and demand whatsoever, both at law and in equity, of them the said *B E K, BK, and GF*, and every of them, of, in, to, or out of, the same, and every part thereof, together with the said recited indenture of lease; and all other deeds, evidences, and writings whatsoever, relating to, or in any wise concerning the same premises, or any part thereof, which they the said *B E K, BK, and GF*, or any of them, now have or hath, in their, or any of their custody or possession; or can or may obtain, without suit at law or in equity: TO HAVE AND TO HOLD the said piece Haben- or parcel of ground, messuages or tenements, and all and dum. singular other the premises hereinbefore expressed to be hereby assigned, with the appurtenances, unto the said *D J*, his executors, administrators, and assigns, from henceforth, for and during all the rest, residue, and remainder, now to come and unexpired, of the said term of _____ years therein, subject nevertheless to the payment of the rent and performance of the covenants and agreements in the said hereinbefore recited indenture of lease, of the _____ day of _____ 17_____, reserved and contained on the tenant or lessee's part and behalf, to be paid, observed, and performed, and also subject to the proviso for redemption of the said premises hereinafter contained. And this indenture further witnesseth, that for the considerations Affign- aforesaid, they the said *B E K, BK, and GF*, have, ment of a and every of them hath, assigned, transferred, and policy of set over; and by these presents do, and every of them doth, assign, transfer, and set over, all that policy of insurance, number _____, whereby the said messuages or tenements, and buildings, hereinbefore expressed to be hereby assigned, are insured from loss or damage by fire, in the _____ insurance office, London; and all sum and sums of money therein mentioned, or thereby insured, upon the said premises, or any part thereof, and recoverable thereupon, to have and to hold, receive, take, and enjoy, the said policy of insurance, and sum and sums of money, and every part thereof, unto the said *D J*, his executors, administrators,

tors, and assigns, to and for his and their own use and benefit, subject nevertheless to the proviso or condition for redemption thereof, hereinafter contained (that is to say), Provided always, and these presents are upon this express condition, that if the said *B E K*, *B K*, and *G F*, their executors, administrators, or assigns, do and shall, well and truly pay, or cause to be paid, unto the said *D J*, his executors, administrators, or assigns, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, the sum of ——l. of, &c. with interest for the same, after the rate of 4 per cent. per ann. in manner following (that is to say), the sum of ——l. being one half year's interest of the said sum of ——l. after the rate aforesaid, upon the day of —— next ensuing, and the further sum of ——l. being the whole principal money and one half year's interest thereof, after the rate aforesaid, upon the —— day of ——, which will be in the year of our Lord 17—, without any deduction or abatement whatsoever out of the same, or any part thereof, for or in respect of any rates, taxes, charges, assessments, or impositions whatsoever, now taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed, upon the said piece or parcel of ground, mefluages or tenements, and hereditaments, hereinbefore expressed to be hereby assigned, or any part thereof, or upon the said principal sum of ——l. or the interest thereof, or upon the said *D J*, his executors, administrators, or assigns, for or in respect of the same, or any part thereof, by authority of parliament or otherwise however (being the same principal money and interest as are in part secured by the joint and several bond of them the said *B E K*, *B K*, and *G F*, bearing even date with these presents), then and in such case this present indenture, and the assignments hereinbefore expressed to be hereby made, and every clause, article, matter, and thing, herein contained, shall cease, determine, and be absolutely void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof, in any wise notwithstanding. And Indenture this indenture further witnesseth, that for the consideration further

sideration aforesaid, and for the better securing the re-payment to the said *D J*, his executors, administrators, or assigns, of the said sum of _____ l. and interest, and also for and in consideration of ten shillings of, &c. by the said *D J* to the said *T S* (party hereto) in hand, well and truly paid, at or before the sealing and delivery of these presents, the receipt, whereof is hereby acknowledged. He the said *T S*, party hereto, at the request and by the direction of the said *B E K*, *B K*, and *G F*, testified, by their being respectively made parties to, and sealing and delivering these presents doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said *D J*, his heirs, executors, administrators, and assigns, that he the said *T S*, party hereto, or his heirs, shall and will, at the costs and charges of them the said *B E K*, *B K*, and *G F*, or some or one of them, at the next Court Baron or customary Court to be holden for the manor of *T* aforesaid, surrender into the hands of the Lord of the said manor, according to the custom thereof, all and singular the said copyhold or customary messuages or tenements, lands and hereditaments, hereinbefore particularly described and mentioned to have been surrendered on the _____ day of _____ 17_____, by the said *H W* to the use of the said *T S* and *H T* (since deceased), their heirs and assigns as aforesaid, together with their and every of their rights, members, and appurtenances, and all the estate, right, title, interest, property, claim, and demand, whatsoever, at law and in equity, of him the said *T S*, party hereto, of, into, or out of the same, and every part thereof, to the use and behoof of him the said *D J*, his heirs and assigns for ever, at the will of the Lord, according to the custom of the said manor, subject nevertheless to the same or the like proviso or condition for redemption thereof, as is hereinbefore contained for the redemption of the said leasehold messuages or tenements, and premises hereinbefore expressed to be hereby assigned. And the said *T S*, for himself, his heirs, executors, and administrators, doth hereby further covenant and agree with the said *D J*, his heirs and assigns, that he the said *T S*, party

as to the
copyhold
premises,

Covenant
to surren-
der same.

Free from
incum-
brances.

party hereto, hath not, at any time heretofore, done, committed, or executed, or wittingly or willingly permitted or suffered any act, deed, matter, or thing, whatsoever, whereby or by means, or in consequence whereof, the said copyhold or customary messuages or tenements, lands and hereditaments, hereinbefore covenanted to be surrendered, or any part thereof, are, is, can, shall, or may be, in any wise impeached, charged, prejudiced, or incumbered, in title, estate, Legatee's or otherwise howsoever. And the said *B E K*, *B K*, covenant and *G F*, do hereby for themselves, severally and respectively, and for their several and respective heirs, executors, administrators, and assigns, covenant and agree with the said *D J*, his heirs, executors, administrators, and assigns, in manner following (that is to say), that they the said *B E K*, *B K*, and *G F*, or some or one them, their, or some or one of their, heirs, executors, administrators, or assigns, shall and will, well and truly pay, or cause to be paid, unto the said *D J*, his executors, administrators, or assigns, the sum of _____ l. of, &c. with interest for the same, after the rate aforesaid, at the place and times, and in the manner hereinbefore limited and appointed for the payment thereof, according to the true intent and meaning of these presents. And also that the said hereinbefore recited indenture of lease of the _____ day of _____ 17_____, is a good and effectual lease, valid in the law, and yet subsisting, and not surrendered, forfeited, or become void or voidable in any wise howsoever. And that the rent and covenants therein reserved and contained, on the tenant's or lessee's part, have been duly paid, observed, and performed, up to the _____ day of _____ last. And that they the said *B E K*, *B K*, and *G F*, or some or one of them, now at the time of the sealing and delivery of these presents, have or hath in themselves, himself, or herself, good right and full power to assign the said leasehold messuages or tenements, and premises, hereinbefore expressed to be hereby assigned, with the appurtenances, unto him the said *D J*, his executors, administrators, and assigns, in the manner aforesaid, and according to the true intent and meaning

*That the
lease is
valid.*

ing of these presents. And also that the said *T S*, That *T S* party hereto, is now at the time of the sealing and de- is feised livery of these presents, lawfully, rightfully, and ab- of the co- solutely, feised to him and his heirs, of a good estate pyhold premises, of inheritance in fee simple, according to the custom according of the said manor of *T* aforesaid, of and in the said to the cus- copyhold or customary messuages or tenements, and tom of the hereditaments, hereinbefore covenanted to be surren- manor. dered, with the appurtenances, in trust for them the said *B E K*, *B K*, and *G F*, or some or one of them, their, or some or one of their, heirs, executors, or administrators, without any condition, limitation, matter, or thing, whatsoever, to alter, change, charge, or incumber the same. And that he the said *T S* hath good right, by the direction of them the he will, said *B E K*, *B K*, and *G F*, to surrender the same co- by the di- pyhold or customary messuages or tenements, and he- rection of reditaments, with the appurtenances, to the use of tees, fur- him the said *D J*, his heirs and assigns, in the man- render ner aforesaid. And further, that it shall and may be fame to lawful, to and for the said *D J*, his executors, ad- ministrators, and assigns, respectively, from time to time, and at all times, from and after default shall be Mortga- made in payment of the said sum of ——l. and in- terest, or any part thereof, contrary to the proviso hereinbefore contained, and the true intent and mean- ing of these presents, peaceably and quietly to enter into and upon, have, hold, use, occupy, possess, and enjoy, all and singular the said leasehold and copyhold mesuages or tenements, hereditaments and premises, hereinbefore expressed to be hereby assigned and cove- nanted to be surrendered, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any let, suit, hindrance, interruption, dis- turbance, or denial whatsoever, of or by the said *B E K*, *B K*, and *G F*, or any of them, their, or any of their, heirs or assigns, or any other person or persons whom- soever; and that free and clear, and freely and clearly, acquitted, exonerated, and discharged, or otherwise, by them the said *B E K*, *B K*, and *G F*, or some or one of them, their, or some or one of their, heirs, execu- tors,

For further assurance.

tors, administrators, or assigns, well and sufficiently saved, harmless and indemnified, of, from, and against, all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, trusts, wills, estates, titles, charges, and incumbrances, whatsoever. And moreover that they the said *TS, BEK, BK, and GF*, and every of them, and their, and every of their respective heirs, executors, and administrators, and all and every other person and persons whomsoever, claiming, or who may at any time hereafter have, or lawfully claim, any estate, right, title, trust, or interest, either at law or in equity, of, into, or out of, the said leasehold and copyhold messuages and tenements, hereditaments and premises, hereinbefore expressed to be hereby assigned and covenanted to be surrendered, or any part thereof, shall and will, from time to time, and at all times, from and after such default shall be made in payment of the said sum of ——*l.* and interest, or any part thereof as aforesaid, upon every reasonable request of the said *D J*, his executors, administrators, or assigns, but at the proper costs and charges, in the law, of the said *BEK, BK, and GF*, or some or one of them, their, or some or one of their, heirs, executors, administrators, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable act and acts, thing and things, devises, conveyances, and assurances, in the law whatsoever, for the further, better, and more perfectly and absolutely assigning, surrendering, conveying, and assuring, of all and singular the same leasehold and copyhold messuages or tenements, hereditaments and premises, with their and every of their appurtenances, unto and to the use of him the said *D J*, his heirs, executors, administrators, and assigns, respectively, according to the nature and quality of the same premises, freed and discharged from the said proviso or condition for redemption thereof, hereinbefore contained, and all equity thereupon, and all other right, title, and equity of redemption whatsoever, as by him the said *D J*, his executors, administrators, or assigns, or his or their counsel,

learned

learned in the law, shall be reasonably and lawfully devised, advised, and required; Provided always, and Proviso, it is hereby declared and agreed, by and between all that until the said parties to these presents, that in the mean time, default and until default shall be made in payment of the said sum of ——l. and interest, or of some part thereof, enjoy the contrary to the proviso and covenant for payment thereof, hereinbefore contained; it shall and may be lawful, to and for the person or persons who shall or may, for the time being, be entitled to redeem the said leasehold and copyhold messuages or tenements, hereditaments and premises, hereinbefore expressed to be hereby assigned and covenanted to be surrendered, peaceably and quietly to have, hold, use, occupy, possess, and enjoy, all and singular the same leasehold and copyhold messuages or tenements, hereditaments and premises, respectively; and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for, his, her, and their, own use and benefit, without the lawful let, suit, trouble, hindrance, interruption, disturbance, or denial whatsoever, of or by the said *D J*, his heirs, executors, administrators, or assigns, or of or by any other person or persons whomsoever, lawfully claiming or to claim, by, from, or under, him, them, or any of them. In witness.

*Assignment of a Mortgage Debt, and a Term of Years
for securing the same.*

THIS indenture, made the 5th day of *April*, in the year of our Lord 1799, and in the 39th year of the reign, &c. between *Thomas Jones* of, &c. of the one part, *Robert Crawford* of, &c. of the 2d part, and *Peter Clark* of, &c. of the 3d part. Whereas by an Recital of indenture of demise and mortgage, bearing date, &c. and a mortgaged to be made between the said *Robert Crawford* & *gagee*.
of,

of, &c. of the one part, and *David Morgan* of, &c. of the other part. It is witnessed, that in consideration of 1,500*l.* by the said *David Morgan* to the said *Robert Crawfurd*, well and truly paid, he the said *Robert Crawfurd* did thereby bargain, sell, and demise, unto the said *David Morgan*, all those the messuages, farms, lands, tenements, and hereditaments, therein and hereinafter particularly mentioned and described, with their appurtenances, to hold the same unto the said *David Morgan*, his executors, administrators, and assigns, from the day of the date of the said indenture, for and during and unto the full end and term of 500 years, from thence next ensuing, without impeachment, of or for any manner of waste, subject nevertheless to a proviso or condition therein contained, for making the same void on payment, by the said *Robert Crawfurd*, his heirs, executors, or administrators, to the said *David Morgan*, his executors, administrators, and assigns, of the sum of 1500*l.* and interest, after the rate and on the time there mentioned. And whereas, by an indenture of assignment, bearing date, &c. and expressed to be made between the said *David Morgan* of the 1st part, the said *Robert Crawfurd* of the 2d part, and the said *Thomas Jones* of the 3d part, It is witnessed, that in consideration of the sum of 1500*l.* paid to the said *David Morgan* by the said *Thomas Jones*, the said *David Morgan* did assign unto the said *Thomas Jones*, his executors, administrators, and assigns, the said principal sum of 1500*l.* so as aforesaid, secured to the said *David Morgan* on the aforesaid hereditaments and premises comprised in the aforesaid term of 500 years, and the interest thereafter to grow due for the same, by virtue of the said recited indenture of, &c. and the full benefit of all the covenants and agreements in the same indenture contained, to hold the same to the said *Thomas Jones*, his executors, administrators, and assigns, absolutely for ever. And it is by the said indenture now in recital further witnessed, that for the considerations aforesaid, and other the considerations therein mentioned, the said *David Morgan*, by the direction and appointment of the said *Robert Crawfurd* (testified as therein mentioned), did bargain, sell, assign,

assign, transfer, and set over, and the said *Robert Crawfurd* did ratify and confirm, unto the said *Thomas Jones*, his executors, administrators, and assigns, the mes- suages, farms, lands, tenements, and hereditaments, which, in and by the said recited indenture of, &c. were demised unto the said *David Morgan*, for the term of 500 years, to hold the same unto the said *Thomas Jones*, his executors, administrators, and assigns, for the residue and remainder then to come and unexpired, of the said term of 500 years, by the said indenture, demised as aforesaid, subject nevertheless to such right and equity of redemption, as the same hereditaments and premises were then subject and liable to, by virtue of the same indenture of, &c. or of the said proviso therein contained. And whereas the said principal sum of 1500*l.* secured by the recited indenture of mortgage, and so assigned as aforesaid, is still due and owing to the said *Thomas Jones*, upon or by virtue of the said recited security, but all interest for the same hath been paid up to the day of the date of these presents, which the said *Thomas Jones* doth hereby acknowledge and declare; and the said *Thomas Jones* being desirous to call in and receive the said sum of 1500*l.* the said *Peter Clarke* is willing to take an assignment of the said security, and to stand in the place of the said *Thomas Jones* in respect thereof, and hath accordingly agreed to advance and lend the said principal sum of 1500*l.* upon having an assignment of the said mortgage debt, and of the said mortgaged premises, from the said *Thomas Jones*, for the residue now to come and unexpired of the said term of 500 years, in manner hereinafter mentioned. Now this indenture witnesseth, that in pursuance of the said agreement, and for and in consideration of the sum of 1500*l.* of lawful money of Great Britain, to the said *Thomas Jones* in hand, well and truly paid, by the said *Peter Clarke*, at or before the sealing and delivery of these presents, by and with the privity and consent of the said *Robert Crawfurd* (testified by his being a party to, and sealing and delivery of, these presents), being the whole of the money now due and owing to the said *Thomas Jones*, upon or by virtue of the said

recited security, the receipt of which said sum of 1500*l.* the said *Thomas Jones* doth hereby acknowledge, and the payment whereof to the said *Thomas Jones*, by the said *Peter Clarke*, in manner aforesaid, he the said *Robert Crawfurd* doth hereby acknowledge, and of and from the same sum, and every part thereof, the said *Thomas Jones*, as well as the said *Robert Crawfurd*, do, and each of them doth, acquit, release, and for ever discharge, the said *Peter Clarke*, his executors, administrators, and assigns, for ever; by these presents, he the said *Thomas Jones*, with the privity and by the direction and appointment of the said *Robert Crawfurd* (testified by his being made a party to, and sealing and delivering these presents), hath bargained, sold, assigned, transferred, and set over; and by these presents doth bargain, sell, assign, transfer, and set over, unto the said *Peter Clarke*, his executors, administrators, and assigns, the said principal sum of 1500*l.* so as aforesaid, secured to the said *David Morgan* on the said hereditaments and premises comprised in the said term of 500 years; and by him the said *David Morgan* assigned to the said *Thomas Jones*, as hereinbefore is mentioned, together with all sums of money from henceforth to grow due by way of interest, for or in respect of the said principal sum of 1500*l.* and the full benefit of all the covenants and agreements in the said indenture of, &c. contained for the repayment, or for securing the repayment of the same principal sum and interest thereof, to have, hold, receive, take, and enjoy, the said principal sum of 1500*l.* and the interest thereof, and the full benefit of the said securities, covenants, and agreements, unto the said *Peter Clarke*, his executors, administrators, and assigns, as his and their own money and absolute property for ever. And this indenture also witnesseth, that in further pursuance of the said agreement, and also in consideration of the sum of 10*s.* of like lawful money, to the said *Thomas Jones* and *Robert Crawfurd*, in hand, paid by the said *Peter Clarke*, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged. He the said *Thomas Jones*, with the privity and by the direction and appoint-

appointment of the said *Robert Crawfurd* (testified as aforesaid), hath bargained, sold, assigned, transferred, and set over; and by these presents doth bargain, sell, assign, transfer, and set over; and the said *Robert Crawfurd* hath ratified and confirmed, and by these presents doth ratify and confirm, unto the said *Peter Clarke*, his executors, administrators, and assigns, all those, &c. (here insert the parcels and the general words), to have and to hold the said messuages, &c. hereinbefore by these presents assigned, or expressed or intended so to be, with their and every of their appurtenances, unto the said *Peter Clarke*, his executors, administrators, and assigns, from thenceforth, for and during all the residue and remainder of the said term of 500 years therein, and by the said indenture of, &c. created and demised, and now to come and unexpired, subject nevertheless to such right and equity of redemption as the same premises are now subject and liable to, under and by virtue of the same indenture of, &c. and of the proviso or agreement for redemption therein contained. And the said *Thomas Covenant Jones* doth hereby for himself, his heirs, executors, from Aſ- and administrators, covenant and agree with the said signor *Peter Clarke*, his executors, administrators, and aſ- that the signs, in manner following (that is to say), that the money is aforesaid principal sum of 1500*l.* is now justly due and still due, owing to the said *Thomas Jones*, by virtue of the here- and that inbefore recited security; and that he the said *Thomas Jones* hath not, at any time heretofore made, done, and committed, or executed, or unwittingly or willingly permitted or suffered any act, deed, matter, or thing, whatsoever, whereby or by means whereof the said messuages, farms, lands, tenements, and premises, hereby assigned, or intended so to be, or any of them, or any part thereof, are, is, can, thall, or may, be any wise impeached, charged, affected, or incumbered, in title, charge, estate, or otherwise howsoever, or the said term of 500 years, forfeited, mortgaged, extinguished, or become void or voidable. In witness, &c.

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ERRATA.

Page 8, line 13, for *has* read *his*.

15, — 22, for *B* read *A*.

30. the end of line 3, and beginning of line 4, the word *present* to be omitted.

49, line 8, for *ultimately* read *ultimately*.

83, — 11, for *o* read *of*.

121, — 17, after *wife* add *for life*.

159, — 12, for 1780 read 1708.

221, — 20, for *mortgagor* read *mortgagee*.

234, — 2, for *although* read *thought*.

243, — 17, a comma to be placed at *s*, and line 18, *the* to be omitted, and read *mortgagee* for *mortgagors*.

292, — 5, for *broke* read *broken*.

311, — 21, for *applied* read *ought to apply*; “*and*”, at the end of the line, to be omitted.

315, — 16, for *schedule* read *scheduled*.

332, — 2, after *that* add *if*.

423, — 2, for *forty* read *twenty*.

588, — 23, after *of* add *an*.

605, — 9, after *HB* add *the son*.

605, — 12, for *B* read *HB*.

623, — 15, for *JS* read *TS*.

684, — 7, for *C* read *B*.

684, — 8, for *B* read *C*.

After 703, for 740 read 704.

738, line last, for *mortgages* read *mortgagees*.

808, — last, for *this* read *that*.

846, — 19, for *C* read *B*.

931, — 24, for *Mrs.* read *Mary*.

931, — 25, *the mother* to be omitted.

931, — 27, after *George Evelyn* add *the son*.

966, — 18, for *on* read *of*.

1048, — 23, after *law* add *of the mortgagee*.

1048, — last, after *administrator* add *of the mortgagee*.

1125, — 17, for *JK* read *CK*.

1131, — 16, for *bargainor* read *mortgagor*.



THE BINDER

Will divide the Volumes at Page 569.

